DOCKET

No. 08-295
Vide 08-307
Title: The Travelers Indemnity Company, et al., Petitioners
v.
Pearlie Bailey, et al.
Docketed: September 4, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-2099, 06-2103, 06-2105, 06-2118, 06-2186)
Decision Date: February 15, 2008
Rehearing Denied: May 8, 2008
Questions Presented

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 21 2008	Application (08A63) to extend the time to file a petition for a writ of certiorari from August 6, 2008 to September 5, 2008, submitted to Justice Ginsburg.
Jul 22 2008	Application (08A63) granted by Justice Ginsburg extending the time to file until September 5, 2008.
Sep 4 2008	Petition for a writ of certiorari filed. (Response due October 6, 2008)
Sep 17 2008	Order extending time to file response to petition to and including November 5, 2008.
Oct 6 2008	Motion for leave to file amicus brief filed by Property Casualty Insurers Association of America.
Oct 8 2008	Opposition of respondents Asbestos Personal Injury Plaintiffs to motion of Property Casualty Insurers Assn. of America for leave to file amicus brief filed.
Oct 15 2008	Letter of October 14, 2008, from counsel for Property Casualty Insurers Association of America requesting that its motion for leave to file amicus brief be withdrawn from consideration.
Nov 3 2008	Brief of respondent Chubb Indemnity Insurance Company in opposition filed. VIDED.
Nov 5 2008	Brief of respondents Cascino Asbestos Claimants in opposition filed. VIDED.
Nov 5 2008	Brief of Asbestos Personal Injury Respondents in opposition filed. VIDED.
Nov 17 2008	Reply of petitioners Travelers Casualty and Surety Company, et al. filed.
Nov 19 2008	DISTRIBUTED for Conference of December 5, 2008.
Dec 8 2008	DISTRIBUTED for Conference of December 12, 2008.
Dec 12 2008	Petition GRANTED. The case is consolidated with No. 08-307, and a total of one hour is allotted for oral argument.
Jan 23 2009	Motion to dispense with printing the joint appendix filed by petitioners. VIDED.
Jan 26 2009	SET FOR ARGUMENT ON Monday, March 30, 2009.
Jan 26 2009	Brief of petitioners Travelers Indemnity Company, et al. filed.
Jan 26 2009	Opposition of respondent Chubb Indemnity Insurance Co. to petitioners' motion to dispense with printing of the joint appendix. VIDED.
Jan 29 2009	CIRCULATED.
Feb 2 2009	Brief amici curiae of Future Claimants Representatives in support of neither party filed. (Distributed) VIDED.
Feb 2 2009	Brief amici curiae of Resolute Management Inc. filed. (Distributed)
Feb 10 2009	Motion for divided argument filed by respondent Chubb Indemnity Insurance Company. VIDED.

Feb 23 2009	Motion to dispense with printing the joint appendix filed by petitioners DENIED.
Feb 25 2009	Joint appendix for respondent Chubb Indemnity Insurance Company filed. Statement of costs received. VIDED. (Distributed)
Feb 25 2009	Brief of respondents Pearlie Bailey, et al., and Cascino Asbestos Claimants filed. VIDED. (Distributed)
Feb 25 2009	Brief of respondent Chubb Indemnity Insurance Company filed. VIDED. (Distributed)
Feb 26 2009	Brief amici curiae of Jagdeep S. Bhandari, et al. filed. VIDED. (Distributed)
Mar 4 2009	Motion of Future Claimants Representatives in support of neither party for leave to participate in oral argument as amici curiae and for divided argument filed. VIDED.
Mar 6 2009	Joint appendix filed. (Distributed) VIDED. (Statement of costs received).
Mar 6 2009	Opposition to motion of Future Claimants Representatives filed by counsel for respondents.
Mar 9 2009	Motion for divided argument filed by respondent GRANTED. and the time is divided as follows: 20 minutes to the Cascino Asbestos Claimants, and 10 minutes to Chubb Indemnity Insurance Company.
Mar 11 2009	Opposition to motion of Future Claimants Representatives filed by counsel for petitioners Travelers Indemnity Co.
Mar 12 2009	Opposition to motion of Future Claimants Representatives filed by counsel for petitioners Common Law Settlement Counsel.
Mar 13 2009	Reply of petitioners Travelers Indemnity Company, et al. filed. (Distributed)
Mar 17 2009	Reply of amici curiae Future Claimants Representatives in support of the motion for divided argument and for leave to participate in oral argument as amici curiae.
Mar 20 2009	Motion of Future Claimants Representatives in support of neither party for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Mar 20 2009	Record recieved from U.S.C.A. for 2nd Circuit. (1 box)
Mar 23 2009	Record received from U.S.D.C. for the Southern District of New York. (3 boxes)
Mar 30 2009	Argued. For petitioners: Barry R. Ostrager, New York, N.Y. For respondents: Cascino Asbestos Claimants: Samuel Issacharoff, New York, N.Y. For respondent Chubb Indeminity Insurance Company: Jacob C. Cohn, Philadelphia, Pa.

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PETITION FOR WRIT OF CERTIORARI

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No. (1)

Supreme Court, U.S.
FILED

08-295 AUG 4 - 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1986, the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.) confirmed a landmark plan of reorganization for Johns-Manville Corporation that channeled hundreds of thousands of asbestos-related personal injury claims into a special trust fund for the benefit of injured workers and their families. The linchpin of this reorganization was the contribution of tens of millions of dollars by Petitioners and other insurers into a trust for payment of asbestos claims in exchange for protection from future claims against the insurers, all of which was intended to provide Petitioners with full and final protection from suits relating to, arising from or in connection with the Petitioners' insurance relationship with Johns-Manville. The Manville confirmation order was affirmed in a final judgment rendered by the Second Circuit in 1988.

The confirmation order in Manville was subsequently ratified by the U.S. Congress (*see* 11 U.S.C. 524(h)) and used as a model for Section 524(g) of the Bankruptcy Code. In the decades following the entry of the final judgment affirming the Manville plan of reorganization, and in reliance on the protections enacted by Congress, *tens of billions of dollars* have been paid into "524(g) trusts" for the benefit of hundreds of thousands of asbestos claimants. In 2002, Petitioners sought to enforce the court's orders when certain asbestos claimants tried to evade the confirmation order by suing Travelers directly in so-called "direct actions." The suits were enjoined by the bankruptcy court that fashioned the Manville plan of reorganization, which held that they

were proscribed by the 1986 confirmation order. The bankruptcy court's decision was affirmed by the District Court, but in February 2008, over two decades after the original orders became final, a different panel of the Second Circuit held that the bankruptcy court lacked authority in 1986 to enter a confirmation order that extended beyond the "*res*" of the debtor's estate, *i.e.*, insurance policy proceeds.

The question presented, therefore, is: Whether the court of appeals erred in categorically holding that bankruptcy courts do not have jurisdiction to enter confirmation orders that extend beyond the "*res*" of a debtor's estate, despite this Court's recent ruling that "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain respects, for more than simple adjudications of rights in the res," *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), and whether the court of appeals compounded this error by:

(a) failing to apply as written a federal statute (11 USC §§ 524(g) and (h)), by limiting the scope of relief in a manner that is contrary to the express terms and purposes of that statute;

(b) failing to give effect to the Supremacy Clause and holdings of this Court that federal bankruptcy relief cannot be overridden by rights alleged to have been created under state law; and

(c) failing to respect important principles of finality and repose, and the express provisions of § 524(g), by failing to approve a federal court's enforcement of a confirmation order that was affirmed over two decades ago on direct appeal.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this case are The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp.

In addition to Petitioners, other appellees below were Common Law Settlement Counsel, Statutory Settlement Counsel, and Hawaii Settlement Counsel.

The Respondents in this case (appellants below) are Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony, Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs, and Cascino Asbestos Claimants.

The Debtors in the Chapter 11 proceedings from which this petition arises are Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation, and Manville Service Corporation), Manville International Canada, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl Ranch Corporation, Johns-Manville Idaho, Inc., Manville Canada Service, Inc., and Sunbelt Contractors, Inc.

RULE 29.6 DISCLOSURE

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

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In The Supreme Court of the United States

THE TRAVELERS INDEMNITY CO., ET AL., PETITIONERS

v.

PEARLIE BAILEY, ET AL., RESPONDENTS.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

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The Travelers Indemnity Company, Travelers Casualty and Surety Company, and Travelers Property Casualty Corp. (collectively, "Travelers" or "Petitioners") respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (App. 1a) is reported at 517 F.3d 52. The district court's opinion (App. 37a) is reported at 340 B.R. 49. The bankruptcy court's order (App 86a) and findings of fact and conclusions of law (App. 101a) are not officially reported, but are available at 2004 WL 1876046 and 2004 Bankr. Lexis 2519.

The bankruptcy court's original insurance settlement order (App. 210a) and confirmation order (App. 261a) are unreported, but were immediately preceded by an opinion (App. 297a) reported at 68

B.R. 618. The district court's opinion affirming the original insurance settlement order and confirmation order (App. 204a) is reported at 78 B.R. 407. The Second Circuit's opinion affirming the original insurance settlement order and confirmation order (App. 188a) is reported at 837 F.2d 89.

JURISDICTION

The court of appeals entered its judgment on February 15, 2008 (App. 463a), and denied a timely petition for rehearing and/or rehearing *en banc* on May 8, 2008 (App. 457a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On July 21, 2008, Travelers submitted an application to Justice Ginsburg for a 30-day extension in which to file a petition for writ of *certiorari* pursuant to Supreme Court Rule 13.5. Justice Ginsburg granted the 30-day extension.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 4 of the U.S. Constitution provides that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

Section 105(a) of the Bankruptcy Code provides, in pertinent part, that bankruptcy courts "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Section 524(e) of the Bankruptcy Code provides, in pertinent part, that "discharge of a debt

of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

Section 524(g)(4)(A)(ii) of the Bankruptcy Code provides that in asbestos-related bankruptcies, "[n]otwithstanding the provisions of section 524(e)," a bankruptcy court may bar "any action directed against a third party who . . . is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party."

Section 524(h)(1) of the Bankruptcy Code provides, in pertinent part, that "if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered . . . to satisfy subsection (g)(4)(A)(ii) . . . ."

The complete text of Section 524 of the Bankruptcy Code is set out in the Appendix (App. 466a).

STATEMENT OF THE CASE

This case presents several issues of vital importance to the administration of the Nation's bankruptcy laws. The court of appeals eroded the finality of federal bankruptcy confirmation orders underlying resolution of *hundreds of thousands of potential individual lawsuits and tens of billions of dollars* in trust funds held for the benefit of asbestos claimants by ignoring the plain language of Sections 524(g) and (h) of the Bankruptcy Code and substantially rewriting the landmark Manville confirmation order upon which Sections 524(g) and (h) are based—twenty years after that order was issued and affirmed on direct appeal. In so holding, the court of appeals gave asbestos plaintiffs' lawyers an "end run" around a final federal court judgment by allowing them to do indirectly (by suing a bankrupt debtor's insurer) what they could not do directly.

If left to stand, the decision below would create substantial uncertainty on issues of vital importance to the orderly administration of the Nation's bankruptcy laws. Until the Second Circuit revisited the issue of whether the federal courts could enjoin the claims at issue here, the federal bankruptcy courts uniformly applied the statutory scheme enacted by Congress in §§ 524(g) and (h) based upon the final judgment rendered by the Manville bankruptcy court as affirmed by the Second Circuit in 1988. This Court should review the decision below to provide guidance to the bankruptcy courts and other federal courts on an issue of profound significance to asbestos personal injury claimants

and every other constituency involved in asbestos related and non-asbestos related bankruptcies.

Exercising its broad authority "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const., art. I, § 8, cl. 4, Congress authorized plans of reorganizations containing provisions, subject to numerous high standards, including the approval of two federal judges, to protect insurance companies from claims that "aris[e] by reason of [the insurer's] provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii) (App. 476a-77a). The decision below is erroneous and would cause great uncertainty in a vitally important area of the law.

First, the court of appeals failed to apply the plain text of Sections 524(g) and (h) by holding that the injunction contained in the Manville confirmation order "must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate." 517 F.3d at 67 (App 33a). There is no basis for circumscribing bankruptcy jurisdiction in this manner, given this Court's conclusion in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), that the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*."

Second, the court of appeals ruled that the power of bankruptcy courts to release and channel claims pursuant to this *federal* statute is subject to rights allegedly created under the statutory or common laws of individual states. This holding is

directly contrary to the Supremacy Clause, U.S. Const. art. VI, cl. 2 (federal law is "the supreme Law of the Land . . . [,] any Thing in the Constitution or laws of any State to the Contrary notwithstanding"), and allows the laws of the States to "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

Third, the court of appeals refused to enforce as written a final bankruptcy court confirmation order as it was entered and affirmed decades ago (and after Petitioners made payment of tens of millions of dollars in reliance on that confirmation order). The judicial system cannot function without finality. Nowhere is that principle more important than in the context of asbestos bankruptcies—which is why Congress explicitly provided that these confirmation orders "shall be valid and enforceable and may not be revoked or modified by any court except through [direct] appeal." 11 U.S.C. § 524(g)(3)(A)(i) (App 474a).

A. Johns-Manville

This case concerns the first asbestos-related channeling order issued by a federal bankruptcy court, in the reorganization of Johns-Manville Corporation. Manville was a Fortune 500 company beset by a rapidly growing number of asbestos-related lawsuits when it sought bankruptcy protection in 1982. Its Chapter 11 filing commenced "the most complex bankruptcy reorganization in history." *In re Johns-Manville Corp.*, 78 B.R. 407, 408 (S.D.N.Y. 1987) (App 207a).

Manville's most valuable asset was its insurance coverage, including in particular more than 425 policies issued by Travelers, Manville's primary insurer for decades. The availability of this insurance to pay asbestos claimants was the subject of contentious litigation between Manville and Travelers regarding the scope and limits of the policies. Numerous parties (including Manville factory workers in Louisiana and Manville executives and vendors who distributed Manville asbestos) also claimed rights under the policies. *See, e.g., In re Davis*, 730 F.2d 176 (5th Cir. 1984). Thus, Manville's most significant asset was illiquid and of uncertain value, making it unavailable to satisfy the thousands of asbestos-related personal injury claims that were asserted and would continue to be asserted against the company in courts throughout the country.

The bankruptcy court crafted a solution. Drawing on the long-recognized authority of bankruptcy courts to sell encumbered property free and clear of any liens, *cf.* 11 U.S.C. § 363, the plan of reorganization provided that Travelers "buy back" the insurance policies it had issued to Manville in exchange for a promise of finality expressly contained in the confirmation order. The proceeds of the "sale," in turn, were deposited into the Manville Personal Injury Settlement Trust for the benefit of current and future asbestos claimants, and all asbestos-related claims—past, present and future—were then "channeled" to the corpus of the trust created by the plan of reorganization and whose administration remained within the jurisdiction of the bankruptcy court.

Drawing on its broad equitable power to "issue

any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a), and to "enjoin suits that might impede the reorganization process," *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 93–94 (2d Cir. 1988) (App 200a), the bankruptcy court enjoined "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Travelers issued to Manville.

The bankruptcy court's 1986 confirmation order was affirmed on direct appeal by both the district court and the court of appeals. The Second Circuit's 1988 affirmance (unlike its 2008 decision below) held that the Manville confirmation order "preclude[s] . . . those suits against the settling insurers that arise out of or relate to Manville's insurance policies." *Id.* at 91 (App 194a).

B. Section 524(g)

Congress has attempted to address the challenges of asbestos litigation on many occasions over the last several decades,[1] but the only statute enacted into law is Section 524(g) of the Bankruptcy Code, which was enacted as part of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106. Section 524(g) replicates the trust/channeling order used by the bankruptcy court in Manville. A companion provision, Section 524(h), codifies the pre-existing Manville confirmation order.

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[1] *See, e.g.*, Asbestosis & Mesothelioma Benefits Act, H.R. 6906, 93rd Cong. (1973); Asbestos Health Hazards Compensation Act, H.R. 8689, 95th Cong. (1977); Asbestos Compensation Fairness Act, H.R. 1957, 109th Cong. (2005).

The committee report accompanying the legislation described the Manville confirmation order as "a creative solution to help protect the future asbestos claimants," H.R. Rep. 103-835, at 40, and notes that the purpose of the statute is "to strengthen the Manville . . . trust/injunction mechanisms and to offer similar *certitude* to other asbestos trust/injunction mechanisms that meet the same kind of high standards, as in Manville, with respect to regard for the rights of claimants, present and future . . . ." *Id.* at 41 (emphasis supplied).

C. Proceedings Below

Twenty years after the Second Circuit affirmed the confirmation order on direct appeal, and more than a decade after Congress enacted Section 524(g) based on the Manville model, a different panel of the Second Circuit refused to enforce as written one of its key terms.

In 2002, after being named in a series of lawsuits (the so-called "direct actions") claiming that Petitioners "conspired" with Manville to conceal the dangers of asbestos, Petitioners sought enforcement of the Manville confirmation designed to protect it from such suits. While the matter was pending before the bankruptcy court, former New York Governor Mario Cuomo (appointed as a special mediator by the bankruptcy court) helped facilitate a series of settlements between Petitioners and the direct action claimants that would (if the bankruptcy court's order is reinstated) provide nearly a half billion dollars in funds for the benefit of asbestos claimants.

After a full, contested evidentiary hearing, the bankruptcy court concluded that all of the pending direct action suits against Petitioners violated the 1986 confirmation order, finding as a matter of fact that these new claims were part of a global strategy developed by the asbestos plaintiffs' bar to put Petitioners "'in Manville's chair'" and thereby collect on claims that had already been channeled to the Manville trust. *In re Johns-Manville Corp.*, 2004 WL 1876046, at *12 (Bankr. S.D.N.Y. 2004) (App 127a) (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6–7, 2001 (Am. L. Inst. 2001)). In other words, the bankruptcy court found as a matter of fact that these new direct action claims were indirect attempts to do what the plaintiffs' lawyers were barred from doing directly, and amounted to "double-dipping" from the Manville Trust. *Id.* at *36 (App 185a) (Manville Trust is "designed to fully compensate Trust claimants for all liabilities channeled to the Trust—whether such liability arises from actions by Manville or by the Settling Insurers.").

The Second Circuit agreed with the bankruptcy court's conclusion that these new claims against Petitioners fell squarely within proscriptions of the Manville confirmation order, which enjoined "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Petitioners issued to Manville:

> There is little doubt that, in a literal sense, the instant claims against Travelers "arise out of" its provision of insurance coverage to Manville. The

> bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion.

In re Johns-Manville Corp., 517 F.3d 52, 67 (2d Cir. 2008) (App 33a).

Yet, rather than enforcing the confirmation order as written, the panel concluded that the bankruptcy court *in 1986* was "without power to enjoin all claims that literally 'arise out of' the insurance policies that Manville purchased from Travelers." *Id.* at 66 n.24 (App 33a). The panel limited the Manville confirmation order retroactively so that only *certain* claims against Travelers arising out of its insurance relationship with Manville are barred: those that are "derivative" of Manville's liability, or that "directly affect the *res* of the bankruptcy estate." *Id.* at 61, 66 (App 31a, 35a).

REASONS FOR GRANTING THE PETITION

Section 524(g) and the channeling order it codified from the Manville confirmation order cannot work unless they provide *finality*. Congress recognized that fact by providing for iron-clad relief protecting insurers from third-party claims that "aris[e] by reason of [an insurance company's] provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii) (App 476a-77a).[2] Here, the Second Circuit agreed that the claims against Petitioners satisfy that statutory definition because they "arise out of [Petitioners'] provision of insurance coverage to Manville." 517 F.3d at 67 (App 33a). But rather than end the statutory inquiry there and affirm the considered conclusions of the bankruptcy court and the district court, the court of appeals proceeded to add a further requirement, effectively holding that application of the text as enacted by Congress "risks federal bankruptcy courts displacing state courts for large categories of disputes in which someone may be bankrupt." *Id.* (App 33a).

The Second Circuit's constrained reading of the statute—cabining its reach to only "derivative" liability that directly affects the "*res*" of a debtor's estate—rewrites the text of the statute to add a substantive limitation that was not enacted by Congress. Left uncorrected, the court of appeals'

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[2] Although Section 524(g) was enacted after the Manville confirmation orders were issued and affirmed, its proscriptions nevertheless apply here. As noted above, Section 524(h) effectively codified the pre-existing Manville confirmation order.

ruling would undermine the purposes of the statute and drastically reduce, if not eliminate, the incentive for insurers to contribute funds necessary to make 524(g) trusts the vehicle for distribution of assets to asbestos victims, as practitioners and commentators have been quick to point out when criticizing the Second Circuit's decision. *See, e.g.*, Dan Schechter, *Despite § 524(g), Global Settlement in Asbestosis Case Cannot Deprive Third-Party Plaintiffs of Direct Actions Against Nondebtor Insurer*, 2008 Comm. Fin. News. 18 (Feb. 25, 2008) ("If this opinion stands . . . , quite a few supposedly 'global' asbestos settlements will be imperiled. Some insurers will decline to participate in Manville settlements.").

I. THE SECOND CIRCUIT'S HOLDING THAT BANKRUPTCY JURISDICTION IS LIMITED TO THE "*RES*" OF THE DEBTOR'S ESTATE IS CONTRARY TO THIS COURT'S DECISION IN *KATZ* AND DECADES OF BANKRUPTCY PRACTICE IN THE LOWER FEDERAL COURTS

The Second Circuit held that "a bankruptcy court has jurisdiction only to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." 517 F.3d at 66 (App 31a). While *in rem* jurisdiction is the foundation for much of bankruptcy practice, the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*," including the power to "issue ancillary orders enforcing [bankruptcy courts'] *in rem* adjudications." *Central Virginia Community College* v. *Katz*, 546

U.S. 356, 370 (2006). No Justice sitting in *Katz* disagreed with this core principle. *See id.* at 391 (Thomas, J. dissenting) ("The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however, does not determine whether or not the States enjoy sovereign immunity against such *in rem* suits. And it certainly does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to transfer recovery proceedings—proceedings the majority describes as "ancillary to and in furtherance of the court's *in rem* jurisdiction," though not necessarily themselves *in rem* . . . .").

Indeed, bankruptcy courts have long issued orders that necessarily reach beyond the debtors' *res*. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bank. S.D.N.Y 1991) (affirming a settlement agreement pursuant to which all future claims against a debtor's officers and directors were enjoined), *aff'd*, 960 F.2d 285, 293 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 694, 701–02 (4th Cir. 1989) (affirming bankruptcy court confirmation order that barred claims against a debtor's directors, attorneys and insurers); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (affirming confirmation order that barred claims against debtor's insurers, in connection with creation of $2.35 billion fund for compensation of personal injury claims); *Petition of Portland Electric Power Co.*, 97 F. Supp. 877 (D. Or. 1943) (noting that a federal bankruptcy court can enjoin a state public utilities commissioner from taking action against a public utility company that was a non-debtor subsidiary of the debtor because the state regulated utility, though solvent and not in bankruptcy, "is a wholly owned

subsidiary" of a bankrupt debtor and the company's "stock is the principle asset to be dealt with in the reorganization proceedings"). *See also United States* v. *Energy Resources*, 495 U.S. 545 (1990) (bankruptcy court's power to restructure debtor/creditor relationships in a plan of reorganization not limited to assets in which the debtor has a property interest).

Under Section 524(g)'s trust/channeling mechanism, companies facing asbestos-related liability—as well as their insurers—are, subject to numerous conditions and the approval of two federal judges, permitted to have liabilities to past, present and future claimants dealt with in a plan of reorganization. The claimants, in turn, benefit from the establishment of well-funded trusts designed to maintain solvency for decades. Over a century ago, this Court held that "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law . . . ." *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

The decision below calls this statutory scheme into question. The Second Circuit improperly limited the reach of Section 524(g) to only those claims that are "derivative" of a debtor's liability, or that seek the "*res*" of the debtor's estate. *See* 517 F.3d at 66 (App 31a). This interpretation is inconsistent with the carefully crafted legislative scheme Congress constructed. Congress drafted important conditions to this use of the reorganization process, but not the limitations engrafted by the panel below. *Cf. United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 n.5 (1989) ("[w]hen Congress want[s] to restrict the application of a particular provision of the

[Bankruptcy] Code," it does so in the plain text of the provision). The decision below deprives insurance companies, business enterprises and injured workers and their families of the only means available for definitively resolving asbestos-related liability, outside of flooding the Nation's judicial system with hundreds of thousands of individual lawsuits. Moreover, outside of the asbestos context, the Second Circuit's erroneous limitation of bankruptcy jurisdiction to the "*res*" of the estate undermines the ability of bankruptcy courts to fashion reorganizations in a wide variety of other settings (such as in *Drexel Burnham* and *A.H. Robins*, *supra*), including the reorganization of economically viable business enterprises. The scope of bankruptcy jurisdiction is a matter of material importance in the administration of the Nation's bankruptcy laws.

II. THE SECOND CIRCUIT'S HOLDING THAT ALLEGED STATE-CREATED RIGHTS CAN OVERRIDE A RELEASE AND CHANNELING INJUNCTION CONTAINED IN A BANKRUPTCY COURT'S CONFIRMATION ORDER CANNOT BE RECONCILED WITH THE SUPREMACY CLAUSE

By definition, the discharge, injunction and release remedies of federal bankruptcy law override state laws that give various creditors collection rights outside bankruptcy. The Second Circuit inverted this point, holding that a state law potentially giving collection rights to certain tort claimants takes precedence over the power of the bankruptcy courts to fashion an effective remedy in

the context of a confirmed plan of reorganization.

As a statute enacted pursuant to the Bankruptcy Clause, Section 524(g) necessarily overrides any state statutory or common law that "frustrates the full effectiveness of federal law . . . ." *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971) (declaring a law refusing issuance of a driver's license ineffective against a discharged debtor because the state law frustrated the debtor's "fresh start"). Even earlier than *Perez*, this Court had ruled that private rights arising under state law are subject to laws enacted under Article I, Section 8. *See Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902) (right to enforce judgment on a note, as permitted by state law, subject to discharge in bankruptcy). The purpose of the release and injunctive channeling provisions of the confirmation order at issue here was to deal with alleged state-law claims or demands that could be asserted against Petitioners.

Nonetheless, the court erroneously held that state law, not a federal confirmation order, determined whether these claims could proceed against Petitioners outside of the express provisions of the confirmation order. The court below erroneously looked to *state* tort law to determine the force and effect of a confirmation order issued under *federal* bankruptcy law:

> The nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law. Neither [the bankruptcy court nor the district court] looked to the laws of the states where the claims arose to determine if indeed

> Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose.

517 F.3d at 63.

The Second Circuit had it precisely backwards. Federal law authorizing relief in favor of a discrete class of non-parties in the special context of asbestos bankruptcies is "the supreme Law of the Land . . . [,] any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The force and effect of a federal confirmation order is not dependent on whether an asserted state law-created right truly exists. If "the laws of the states where the claims [against Travelers] arose" purport to allow the imposition of liability on Travelers based on its insurance relationship with Manville, those laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez*, 402 U.S. at 652, and must thus be of no effect in the face of a federal confirmation order dealing with those claims.

Virtually all claims dealt with in a confirmation order are created by non-bankruptcy law (*e.g.*, federal statutory or common law, state statutory or common law). The decision of the panel below that "there is not one but many courthouses where the legitimacy of these actions must be tested" misses the point. Under the Supremacy Clause, once dealt with in a federal confirmation order (here, released and channeled to a trust within bankruptcy court jurisdiction), alleged state law-created causes of action cannot be otherwise pursued. To allow

alleged state law created rights to override express provisions of a federal confirmation order undermines the ability of bankruptcy courts to release asbestos-related liabilities in a confirmation order. The force and effect of a federal confirmation order is a matter of material importance in the administration of the Nation's bankruptcy laws.

III. THE SECOND CIRCUIT'S DECISION UNDERMINES IMPORTANT PRINCIPLES OF JUDICIAL FINALITY AND REPOSE

Upon affirmance by an appellate court, the finality and repose afforded by a federal court judgment "acquires an added moral dimension." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998). In the intervening two decades since Judge Lifland entered the confirmation order in this case, that order has governed the rights and obligations of hundreds of thousands of Manville asbestos claimants and other interested parties. These orders allowed these hundreds of thousands of asbestos claimants to pursue their rights and obtain compensation without the traditional cost and delay associated with the judicial system. No court—prior to the panel that rendered the decision below—had ever questioned the validity of the long-final confirmation order in this case.

Respect for "longstanding observances and settled expectations," *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 218 (2005), are at their height here, where Congress has codified the judgment in question and has used it as a blueprint for future asbestos-related bankruptcies. Indeed,

Congress explicitly recognized the importance of finality in the context of Section 524(g). The statute provides that when a bankruptcy court enters a confirmation order containing asbestos-related channeling orders issued or affirmed by a district court, "then after the time for appeal of the order that issues or affirms the plan . . . the injunction shall be valid and enforceable *and may not be revoked or modified by any court* except through [direct] appeal . . . ." 11 U.S.C. § 524(g)(3)(A)(i) (emphasis added) (App 474a). The legislative history confirms that Congress intended that asbestos bankruptcy confirmation orders be considered "permanent and irrevocable *except on initial appeal* of the plan, if any . . . ." *See* 140 Cong. Rec. S14464 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin) (emphasis added).

Moreover, as noted above, through Section 524(h), and as confirmed by the legislative history, Congress also specifically ratified the confirmation order at issue *in this case*. 11 U.S.C. § 524(h)(1); *see also* H.R. Rep. 103-835, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3350 ("Johns-Manville [has] met and surpassed the standards imposed in this section, [and] will be able to take advantage of the certainty it provides without having to reopen [its] case[].").

The court of appeals' decision to revisit the propriety and scope of the confirmation order nearly a quarter century after the fact "dishonor[s] the historic wisdom in the value of repose." *City of Sherrill*, 544 U.S. at 219. So strong is the principle in favor of finality and repose in our federal system that this Court has rejected collateral attacks on

final confirmation orders even when the portion of the statute under which a plan was confirmed was later found unconstitutional. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), for example, a municipality availed itself of a "municipal-debt readjustment[,]" and a final decree was entered barring all bondholders from asserting any claims not presented to the court. *Id.* at 372–73. Years later, when the act under which the readjustment took place had already been declared unconstitutional,[3] this Court nonetheless rejected a bondholder's attempt to collaterally attack the final order and collect on the bond. *Id.* at 376.

Indeed, here, it is particularly telling that the two principal cases relied upon by the court of appeals—*Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), and *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005)—were decided on *direct* appeal of the orders in question. If the original panel opinion in *MacArthur* (affirming the Manville confirmation order on direct appeal in 1988) had reached the same conclusion as the panel opinion below, Petitioners would never have contributed to the Manville trust. *MacArthur*, 837 F.2d at 90 ("The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal.").

The inequity of altering bankruptcy court protections—*ex post* and without compensation—is the very reason why settled authority prohibits collateral attacks on Chapter 11 reorganizations.

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[3] *Ashton* v. *Cameron County Water Improvement District*, 298 U.S. 513, 532 (1936).

Chicot County, 308 U.S. at 376 (subject matter jurisdiction, may not be attacked collaterally); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938) (acknowledging same principle). Redefining the scope of a long-final confirmation order "unravel[s] intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place," and thereby creates "an unmanageable, uncontrollable situation" for courts and litigants alike. *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993).

In refusing to enforce the plain terms of the orders in this case, the Second Circuit erred not only by improperly circumscribing the reach of a bankruptcy court's plan of reorganization and rewriting a statute validly enacted pursuant to Congress's broad constitutional authority, but also by failing to enforce as written what was a long-final order without even considering the deference due to final orders. The order that the court below failed to enforce was "a cornerstone of Manville's proposed plan of reorganization . . . [and] a critical part of the entire reorganization." *MacArthur*, 837 F.2d at 90 (App 192a). Even *assuming* that order was somehow improper when written in 1986 and affirmed by the district court and the court of appeals in 1988 (and it assuredly was not, for all of the reasons discussed above), that would not justify the Second Circuit's decision to re-write that final order years after the fact, as if it were writing on a totally clean slate.

The importance of finality is not only reflected in numerous decisions of this Court, but Congress also specifically mandated that the injunctive provisions contained in confirmation orders such as

the Manville orders be deemed final and that such injunctions may not be revoked or modified except on direct appeal. *See* 11 U.S.C. § 524(g)(3)(A)(i) (App 474a); *accord* 11 U.S.C. § 524(h)(1) (App 478a-79a). The importance of finality of bankruptcy court confirmation orders also is reflected in 11 U.S.C. § 1144, under which confirmation orders may only be revoked upon application made within 180 days upon a showing that the orders were procured by fraud.

Nowhere has the interest in finality been as important to litigants and the courts as it is in the context of asbestos litigation. What Judge Lifland recognized correctly more than twenty years ago and Congress recognized in enacting the only federal response to the asbestos litigation crisis to date, is that finality is critical. It was critical to Johns-Manville to enable it to emerge from bankruptcy, to insurers such as Petitioners which contributed to the asbestos personal injury trust, and the asbestos claimants who benefited from those contributions. It is the finality offered by orders modeled on this case and those entered pursuant to Section 524(g) that has allowed some seventy companies with asbestos liabilities to reorganize successfully and to provide funds to compensate those injured by asbestos. It is finality that has induced insurers to fund asbestos trusts for the benefit of asbestos claimants, past present and future. Indeed, as Judge Lifland explained:

> The Court's repeated use of the term[s] 'arising out of' and 'related to' [in the court's 1986 orders was] not gratuitous or superfluous; [these terms] were meant to provide the broadest

> protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate.

In re Johns-Manville Corp., 2004 WL 1876046 at *31 (App 172a).

Likewise, literally tens of billions of dollars have been committed to asbestos trusts in cases throughout the country based on the premise that the channeling mechanism originally used by Judge Lifland in the Manville bankruptcy will provide all parties with finality, and that once entered and affirmed, the finality of those orders will be respected. Those resources have been used to pay the claims of vast numbers of past, present and future claimants.

When the Second Circuit effectively rewrote Judge Lifland's orders retroactively (at precisely the time when the court was called on to enforce them), the court failed to consider the important interests in finality and repose that were at stake, and instead gave enterprising plaintiffs' lawyers an "end run" around a final federal court judgment. The decision also stands in conflict with 11 U.S.C. §§ 524(g)(3)(A)(i) and 524(h), and, if allowed to stand, would create enormous uncertainty to parties in prior and future asbestos-related bankruptcies. It would mean courts can reopen long-final orders years after the fact. This highly irregular result "so far depart[s] from the accepted and usual course of judicial proceedings" that it "call[s] for an exercise of this Court's supervisory power." S. Ct. R. 10(b).

CONCLUSION

For the reasons set out above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: November 16, 2007
Decided: February 15, 2008)

Docket Nos. 06-2099-bk (L), 06-2103-bk (con),
06-2105-bk (con), 06-2118-bk (con),
06-2186-bk (con)

IN RE: JOHNS-MANVILLE CORPORATION, DEBTOR

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION F/K/A JOHNS-MANVILLE SALES CORPORATION, SUCCESSOR BY MERGER TO MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH

CORPORATION, JOHNS-MANVILLE IDAHO INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS INC.,

Debtors,

TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS PROPERTY CASUALTY CORP., TRAVELERS INDEMNITY COMPANY, COMMON LAW SETTLEMENT COUNSEL, STATUTORY SETTLEMENT COUNSEL, HAWAII SETTLEMENT COUNSEL,

Movants-Appellees,

—v.—

CHUBB INDEMNITY INSURANCE COMPANY, ASBESTOS PERSONAL INJURY PLAINTIFFS, CASCINO ASBESTOS CLAIMANTS, PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY,

Objectors-Appellants.

Before:

CALABRESI, SOTOMAYOR, and WESLEY,
Circuit Judges.

Appeals from an order of the United States District Court for the Southern District of New York (Koeltl, *J.*), entered on March 28, 2006, affirming in part and vacating in part the August 17, 2004 Findings of Fact and Conclusions of Law by the United States Bankruptcy Court, South-

ern District of New York (Lifland, *J.*), regarding Travelers' motions for approval of certain settlement agreements and for entry of a Clarifying Order.

REVERSED.

SANDER L. ESSERMAN (Cliff I. Taylor, *on the brief*), Stutzman, Bromberg, Esserman & Plifka, PC, Dallas, TX (Douglas T. Tabachnik, Law Offices of Douglas T. Tabachnik, Manalapan, NJ, *on the brief*) *for Objector-Appellant Asbestos Personal Injury Plaintiffs.*

JACOB C. COHN (William P. Shelley, *on the brief*), Cozen O'Connor, Philadelphia, PA, *for Objector-Appellant Chubb Indemnity Insurance Company.*

JASON R. SEARCY, (Joshua P. Searcy, *on the brief*), Jason R. Searcy, P.C., Longview, TX, *for Objector-Appellant Cascino Asbestos Claimants.*

BARRY R. OSTRAGER (Andrew T. Frankel, *on the brief*), Simpson Thacher & Bartlett, LLP, New York, NY (Robert J. Pfister, Simpson Thacher & Bartlett, LLP, Los Angeles, CA, *on the brief*), *for Movants-Appellees Travelers Casualty and Surety Company, Travelers Property Casualty*

Corp., and Travelers Indemnity Company.

RONALD BARLIANT (Kenneth S. Ulrich, Kathryn A. Pamenter, *on the brief*), Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL (Karen A. Giannelli, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, PC, Newark, NJ, *on the brief*), *for Movant-Appellee Common Law Settlement Counsel.*

MATTHEW GLUCK (Kent A. Bronson, *on the brief*), Milberg Weiss, LLP, New York, NY, *for Movant-Appellee Statutory Direct Action Plaintiffs and the Hawaii Plaintiffs.*

WESLEY, *Circuit Judge*:

Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs,[1] and Cascino Asbestos

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[1] The Asbestos Plaintiffs are six asbestos claimants: Shirley Melvin for the Estate of Joyce Myers, Pearlie Bailey for the estate of James Bailey, Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin and Vernon Warnell. Ms. Melvin, Ms. Bailey and Mr. Warnell are clients of Provost & Umphrey, L.L.P., which represents approximately 10,000 claimants affected by the Common Law Settlement agreement, further discussed *infra*. Mr. Anthony, Mr. Cole and Mr. Griffin are clients of Reaud, Morgan & Quinn and Environmental Litigation Group, P.C., which jointly represents 8,300 claimants affected by the Common Law Settlement Agreement.

Claimants[2] ("Appellants") appeal from an order of the District Court for the Southern District of New York (Koeltl, *J.*) affirming in significant part and vacating in part the Findings of Fact and Conclusions of Law entered by the bankruptcy court (Lifland, *J.*) regarding Travelers'[3] motions for approval of certain settlement agreements and for entry of a Clarifying Order in connection with the Chapter 11 proceeding of the Johns-Manville Corporation ("Manville"). The bankruptcy court granted Travelers' motion to approve settlements with three separate classes of "Direct Action"[4] plaintiffs and, in conjunction with the settlements, issued an order clarifying that all Direct Action claims against Travelers were barred by the original 1986 injunction that issued as part of Manville's reorganization plan. Appellants, who

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[2] The Cascino Asbestos Claimants are Common Law asbestos claimants in Illinois, Wisconsin, Indiana, and Texas represented by Michael P. Cascino.

[3] "Travelers" is defined as: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries, and sister companies, as well as each of their respective predecessors, successors, assigns, officers, and directors.

[4] A "direct action" is defined as "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." BLACK'S LAW DICTIONARY 472 (7th ed. 1999). Because this term was used in the proceedings below, we use it here in the interest of clarity. However, as discussed *infra*, many of the suits in the instant case do not constitute true "direct action" claims.

were not party to the settlements, argue that the bankruptcy court erred by interpreting its prior order to enjoin suits brought against Travelers that allege independent misconduct by Travelers during its tenure as Manville's primary insurer. Appellants insist that the bankruptcy court was without subject matter jurisdiction to enjoin claims against Travelers that are not limited by the terms and scope of the insurance coverage Travelers provided Manville, do not seek recovery from Manville's insurance proceeds, and allege independent misconduct by Travelers. We conclude that the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds. The order of the District Court is VACATED and the case REMANDED for further proceedings consistent with this opinion.

Background

This case concerns the outer reaches of a bankruptcy court's jurisdiction. Manville was, by most sources, "the largest manufacturer of asbestos-containing products and the largest supplier of [raw] asbestos in the United States" from the 1920s until the 1970s. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 742 (E.D.N.Y. & Bankr. S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). In its heyday, Manville sold raw asbestos to manufacturers of asbestos-

based products in 58 countries and distributed its own asbestos-based products "across the entire spectrum of industries and employment categories subject to asbestos exposure." (Findings of Fact and Conclusions of Law Regarding Travelers Motions for Approval of Certain Settlement Agreements and for Entry of a Clarifying Order, dated Aug. 17, 2004 (Docket No. 3750), 2004 WL 1876046 (cited herein as "FOF" or "COL") at ¶ 3, 2004 WL 1876046, at *3, *aff'd in part, vacated in part by In re Johns-Manville Corp.*, 340 B.R. 49 (S.D.N.Y. 2006). As a result of studies linking asbestos with respiratory disease, Manville became the target of a growing number of products liability lawsuits in the 1960s and 1970s. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988). Buckling under the weight of its asbestos liability, Manville filed for Chapter 11 protection on August 26, 1982.[5] *Id.*

The bankruptcy filing was without precedent, largely due to the nature of liability Manville faced: a person exposed to Manville asbestos might not develop an identifiable injury for decades.[6] *Id.*; *see also* (FOF ¶ 52; 2004 WL 1876046,

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[5] At the time Manville filed its Chapter 11 petition it was a defendant in more than 12,500 asbestos-related suits. *Kane*, 843 F.2d at 639.

[6] As stated by the bankruptcy court:

> The ultimate challenge of these Chapter 11 cases was to formulate a plan of reorganization for the Debtors which would provide for payment to holders of present or known asbestos . . . claims . . . and those persons who have not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time. . . .

at *14). The bankruptcy court (Lifland, *J.*),[7] cognizant that Manville's insurance policies were the bankruptcy estate's most valuable asset, realized that the value of those policies to the estate was uncertain because Manville was engaged in extensive litigation with its insurance carriers regarding the scope and limits of its policies. (FOF ¶¶ 53-54; 2004 WL 1876046, at *14). To avoid the uncertainty of the insurance litigation and to fund its plan of reorganization, Manville sought to settle its insurance claims. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988); (FOF ¶ 53; 2004 WL 1876046, at *14). Ultimately, Manville settled with its insurers for approximately $770 million.[8] *MacArthur*, 837 F.2d at 90.

> Through it all, this court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings.

In re Johns-Manville Corp., 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 624-25 (Bankr. S.D.N.Y. 186), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd* 843 F.2d 636 (2d Cir. 1988) (internal quotation marks omitted)); *see also Kane*, 843 F.2d at 638, 639 (describing Manville as "one of the nation's most significant Chapter 11 bankruptcy proceedings" and noting that "[a] significant characteristic of . . . asbestos-related diseases is their unusually long latency period. An individual might not become ill from an asbestos-related disease until as long as forty years after initial exposure"). *Id.*

[7] Judge Lifland has honorably presided over the Manville proceedings since their inception.

[8] Further insurance settlements increased the funding substantially to in excess of $850 million.

Travelers, Manville's primary insurer from 1947 through 1976, paid nearly $80 million into the bankruptcy estate (in addition to the $20 million already paid in litigation expenses on behalf of Manville) in exchange for a "full and final release of Manville-related claims." (FOF ¶¶ 12, 58; 2004 WL 1876046, at *5, 15); *see also In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr. S.D.N.Y. 1983). Travelers' settlement, like those of the other Manville insurers, was predicated upon the bankruptcy court issuing an injunction that barred suits against Manville's insurers—including Travelers—and directed litigation by potential claimants instead against the Manville Personal Injury Settlement Trust ("Manville Trust"). (FOF ¶¶ 58, 61; 2004 WL 1876046, at *15). The injunction, embodied in the 1986 Confirmation Order (the "Confirmation Order") and the 1986 Insurance Settlement Order (the "Insurance Settlement Order"), channeled to the Manville Trust any and all claims that were based upon, arose out of, or related to Manville's liability insurance policies. (FOF ¶¶ 61-64; 2004 WL 1876046, at *15-16).

The Confirmation Order simultaneously enjoins "all persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . ." (Order Confirming Debtors' Second Amended and Restated Plan of Reorganization, dated Dec. 22, 1986 at 25, ¶ 29). The bankruptcy court would note during this litigation that its "repeated use of the terms 'arising out of' and

'related to' were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate."[9] (COL ¶ 23; 2004 WL 1876046, at *31).

Undeterred by the 1986 orders, various groups of plaintiffs subsequently filed Direct Action lawsuits against Travelers and other insurers in several states under a variety of legal theories. (FOF ¶ 70; 2004 WL 1876046, at *17). These lawsuits fall into two broad categories: those based on statutory regulation of insurance practices (the "statutory claims") and those based on common law theories (the "common law claims"). (FOF ¶ 72; 2004 WL 1876046, at *17). The statutory claims aim to assert the rights of individuals who are dissatisfied with the settlements they received after negotiating with Travelers acting on behalf of Manville, or who declined to file personal injury suits against Manville because Travelers allegedly suppressed information about asbestos hazards and intentionally propagated an allegedly-fraudulent "state of the art" defense to frustrate the claimants' rights.[10] (FOF

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[9] The bankruptcy court's 1986 orders were previously affirmed by this Court in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d at 94. In 1994, Congress amended the Bankruptcy Code to codify the Manville Injunction. *See* 11 U.S.C. § 524(g); *see also In re Johns-Manville Corp.*, 340 B.R. 49, 63 n.7 (S.D.N.Y. 2006).

[10] The "state of the art" defense is essentially an ability-to-foresee defense. The defense theory is that, at the time of a given asbestos exposure, there was no medical or scientific knowledge of a hazard from asbestos-containing

¶ 73, 78; 2004 WL 1876046, at *18). These plaintiffs allege that Travelers acquired knowledge about the dangers of asbestos through early asbestosis claims from as far back as the 1950s, "recognized the potential for future escalation of asbestos litigation and . . . influence[d] Manville's purported failure to disclose knowledge about asbestos hazards." (FOF ¶ 76; 2004 WL 1876046, at *18). Plaintiffs contend that Travelers' actions amount to a conspiracy in violation of state laws prohibiting unfair insurance trade and settlement practices. (FOF ¶ 74; 2004 WL 1876046, at *18). The common law claimants assert that Travelers violated alleged duties to disclose certain asbestos-related information it learned from Manville during Travelers' long tenure as Manville's primary insurer. (FOF ¶ 82; 2004 WL 1876046, at *19). Many of these theories of liability have not been accepted by any court. (FOF ¶ 81; 2004 WL 1876046, at *19).

The bankruptcy court found the factual predicate of the common law claims to be virtually identical to the predicate of the statutory actions: Travelers acquired knowledge regarding the dangers of asbestos in the 1950s, recognized the potential for future escalation of asbestos

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products and, accordingly, there was no duty to warn the users of such products. Whatever its merits generally, this defense is, in any event, unavailing if the defendant had knowledge of a hazard associated with its asbestos-containing products and nevertheless failed to warn users. *See* Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001) (Docket No. 3415, Ex. L), at ¶¶ 180-201.

litigation, and influenced Manville's purported failure to disclose its knowledge of asbestos hazards. (FOF ¶ 88; 2004 WL 1876046, at *20). For example, the *Gilchrist* plaintiffs allege that Travelers negligently performed inspections, conspired to deprive plaintiffs of information relating to the risks of asbestos exposure, and misrepresented and suppressed information regarding asbestos. (FOF ¶ 82; 2004 WL 1876046, at *19).

In response to the growing number of Direct Action lawsuits, on June 19, 2002, Travelers moved the bankruptcy court to enjoin twenty-six independent actions pending in Louisiana, Massachusetts, Texas, and West Virginia state courts pursuant to the 1986 orders.[11] After holding a series of hearings on the motion, the bankruptcy court referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor of the State of New York, as mediator.[12] Three classes of plaintiffs thereafter settled with Travelers: the "Statutory Direct Action Plain-

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[11] Among these claims were two class actions, a consolidated case in West Virginia involving thousands of plaintiffs, and several individual actions. Of the 4,230 named plaintiffs in the lawsuits for whom information was obtained, at least 4,079 (over 96%) of them had already filed claims against the Manville Trust. Travelers subsequently filed with the bankruptcy court on January 22, 2003 and June 19, 2003 in an effort to enjoin other Direct Action Lawsuits pending in Texas and Ohio.

[12] The efforts of Governor Cuomo in this matter should not be overlooked. The Governor's considerable skill as a mediator is apparent from the record; his dedication to this matter is to be commended.

tiffs," the "Hawaii Plaintiffs," and the "Common Law Plaintiffs" (collectively, the "Plaintiff Appellees").[13] (FOF ¶¶ 93-105; 2004 WL 1876046, at *21-23). The settlements, which totaled almost $500 million, were conditioned upon the entry of an order by the bankruptcy court clarifying that the Direct Action lawsuits are, and have always been, prohibited by the 1986 orders. (FOF ¶¶ 100, 104; 2004 WL 1876046, at *22-23). The bankruptcy court summarized: "Travelers has contended throughout this proceeding that the Direct Action Claims are barred by the Court's prior orders . . . . Nonetheless, under the auspices of the Mediator, Travelers reached a series of landmark settlement agreements that will provide nearly a half billion dollars in additional compensation for asbestos victims." (FOF ¶ 93; 2004 WL 1876046, at *21). Both the Statutory Direct Action Settlement and the Common Law Direct Action Settlement require "plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the . . . direct actions or from the protection provided under [the bankruptcy court's] injunctions." (FOF ¶¶ 99, 103; 2004 WL 1876046, at *22-23).

On August 17, 2004, the bankruptcy court approved the settlement agreements and entered a "Clarifying Order" specifying that the Direct Action lawsuits against Travelers were barred by

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[13] Because we decide this case on other grounds, facts relating to the reasonableness of the settlements and Appellants' technical objections to the settlements are omitted.

the 1986 orders.[14] (Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction, dated Aug. 17, 2004 (Docket No. 3751) ("Clarifying Order") at ¶¶ 6-8, 10).

After engaging in extensive fact-finding regarding Manville and its relationship with Travelers, (FOF ¶¶ 1-49; 2004 WL 1876046, at *2-13), the bankruptcy court determined that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." (FOF ¶ 50; 2004 WL 1876046, at *13). The court noted that while the Direct Action plaintiffs argued that their injuries were separate and independent from those incurred from asbestos exposure, each had experienced personal injury from some form of asbestos exposure. Because "the gravamen of [the] Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers' insurance relationship with Manville, . . . claims against Travelers based on such actions or omissions necessarily 'arise out of' and 'related to' the Policies." (COL ¶ 25; 2004 WL 1876046, at *32).

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[14] The Clarifying Order contained a judgment reduction provision that reduced the judgment obtained in Direct Action Suits against any objecting insurer by the greater of either (a) the amount that the relevant plaintiff received in the settlement, or (b) the amount that the non-settling insurer would have been entitled to obtain from Travelers in contribution or indemnity, had Travelers been party to the litigation. Clarifying Order at 8, ¶ 14.

The court invoked our earlier decision in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d at 93-94, in which we determined that the 1986 orders were jurisdictionally sound as they sought to protect a valuable asset of the bankruptcy estate—Manville's insurance contracts—and concluded that "the Second Circuit has already considered and rejected a claim that the provisions in the Confirmation Order and the Insurance Settlement Order . . . exceeded this Court's jurisdiction." (COL ¶ 9; 2004 WL 1876046, at *28). In the bankruptcy court's view, the Direct Actions violated the 1986 orders, as would future actions of the same variety. (COL ¶ 19; 2004 WL 1876046, at *30). The district court affirmed the bankruptcy court's findings of fact and conclusions of law in substantial part.[15] *In re Johns-Manville Corp.*, 340 B.R. 49, 72-73 (S.D.N.Y. 2006). The court labeled the Direct Action Claims as "creatively pleaded attempts to collect *indirectly* against the Manville insurance policies" and concluded that "barring these claims was a proper exercise of jurisdiction." *Id.* at 64 (citing COL ¶¶ 25-32; 2004 WL 1876046, at *32-33) (emphasis added). The district court recognized that there were jurisdictional limits on the scope of the injunction protecting Travelers from future

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[15] The district court vacated the portion of the bankruptcy court's Findings and Clarifying Order relating to the so-called "gate-keeping" provision installed by the bankruptcy court. *In re Johns-Manville Corp.*, 340 B.R. at 65-66. As written, the "gate-keeping" provision required plaintiffs bringing "asbestos-related direct actions against Travelers" to file for and obtain the bankruptcy court's approval before proceeding. *Id.* at 66 n.12.

direct actions: "[T]he Bankruptcy court has no jurisdiction to bar a suit alleging tortious conduct by Travelers on behalf of a non-Manville insured, conduct that is unrelated to Manville and not based on any knowledge of asbestos gained from Manville, and that did not involve Manville asbestos or asbestos products." *Id.* at 65. These appeals followed.

Discussion

Although several of the parties raise ancillary issues, the current controversy is primarily a question of jurisdiction. Appellants argue that the bankruptcy court was without jurisdiction to enjoin third-party non-debtor suits against Travelers.[16] They insist that the bankruptcy court failed to properly distinguish between (a) claims that seek to recover directly from Travelers for Travelers' separate acts and (b) true Direct Action suits that seek to recover from an insurer contractually obligated to indemnify Manville for its misconduct.[17] Appellees, on the

[16] Although Appellants specifically contest the bankruptcy court's jurisdiction to enjoin the common law claims, we consider the bankruptcy court's jurisdiction to enjoin both the statutory and common law claims to the extent that they are indistinguishable.

[17] Chubb Indemnity Insurance Company raises separate subject matter jurisdiction arguments and more generalized objections couched in due process. Because we decide this case on other grounds, we do not specifically address Chubb's claims. We do note, however, that the indemnity or contribution rights of Chubb and other insurers against Travelers do not significantly differ from the statutory and common law claims

other hand, are of the view that the bankruptcy court was merely enforcing its prior order. They are quick to point out that we have previously upheld the jurisdictional basis for that order's prohibition of an earlier set of policy-related claims. *See MacArthur*, 837 F.3d at 92-93.

It is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders. *See In re Johns-Manville Corp.*, 340 B.R. at 59 (citing COL ¶ 8, 2004 WL 1876046, at *28); *see also In re Petrie Retail, Inc.*, 304 F.3d 223, 230 (2d Cir. 2002); Confirmation Order ¶ 28. And, as mentioned earlier, this Court has already considered and rejected a jurisdic-

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discussed herein. Although these contribution and indemnity claims are brought by insurers that were named in statutory and common law actions, their claims, like the underlying statutory and common law actions, are beyond the bankruptcy court's jurisdiction. *Cf. In re Johns-Manville Corp.*, 340 B.R. at 65 n.10 ("It also follows that because the Bankruptcy Court had jurisdiction to enjoin the Direct Action Suits, it had jurisdiction to enjoin the claims by other insurers against Travelers for contribution or indemnity."). The district court determined that claims for contribution and indemnity were properly enjoined to "provide[ ] protection from other insurance companies who sought to hold Travelers liable indirectly for the damages that it could not be held directly liable to the individual claimants." *Id.* at 61. The fact that Chubb's contribution and indemnity rights are even at issue is indicative of the non-derivative liability that these claims allege: instead of stepping into the shoes of Manville or its vendors to recover some of Manville's insurance coverage, these plaintiffs allege that the insurance industry as a whole had a duty to warn the general public about the dangers of asbestos. (FOF ¶¶ 80-92; 2004 WL 1876046, at *19-21).

tional challenge to the 1986 orders. *See MacArthur*, 837 F.2d at 91-93; *Kane*, 843 F.2d at 643 n.4 (citing *MacArthur*). But while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction. Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed statutory and common law claims. A careful review of the district court's endorsement of the bankruptcy court's analysis is in order.

The district court began its jurisdictional inquiry by considering whether the Direct Action suits and any related contribution and indemnification claims were covered by the 1986 orders. *In re Johns-Manville Corp.*, 340 B.R. at 59-61. After determining that a plain reading of the Insurance Settlement Order would include the Direct Action claims, the court noted that the bankruptcy court's intentional use of broad language in the 1986 orders was meant to provide Travelers with "global finality . . . as a necessary condition for it to make a significant contribution to the Manville estate." *Id.* at 60 (quoting COL ¶ 23; 2004 WL 1876046, at *31). The district court affirmed the bankruptcy court's interpretation of its 1986 orders as covering the Direct Action suits, finding it "reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville [Bankruptcy] Plan." *Id.* at 61.

Having determined that the 1986 orders covered the suits at issue, the district court next considered whether the 1986 order themselves were a proper exercise of jurisdiction over non-debtors. *Id.* Relying on *MacArthur* and a Fifth Circuit case that considered the application of the 1986 orders to Direct Action claims filed against Travelers in Louisiana, *In re Davis*, 730 F.2d 176, 183-84 (5th Cir. 1984) (per curiam), the court concluded that "the Bankruptcy Court had jurisdiction over Travelers' insurance policies, and could act to protect them from dissipation by direct action claims." *In re Johns-Manville Corp.*, 340 B.R. at 63. Without considering the possibility of variations among these state law based claims, the court opined that "[s]uits that seek direct recovery authorized by state statutes from Travelers' insurance policies would reduce the estate's recovery from those policies, thus affecting the 'property of the estate.'" *Id.* Thus, the district court concluded that the bankruptcy court "had subject matter jurisdiction to enjoin these types of direct action claims." *Id.*

The court found congressional support for its conclusion in legislation that explicitly authorizes bankruptcy court "injunctions barring derivative claims against third party insurers." *Id.* (citing 11 U.S.C. § 524(g)). The court explained that 11 U.S.C. § 524(g), added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, was modeled on the Manville injunction. *See* H.R. Rep. 103-835, at 41 (1994), *reprinted in*

1994 U.S.C.C.A.N. 3340, 3349.[18] The district court viewed the statute as a congressional indication "that the Bankruptcy Court's subject matter jurisdiction extend[s] to claims against third party insurers arising from their insurance relationship with the debtor tortfeasor." *In re Johns-Manville Corp.*, 340 B.R. at 63.

The district court, like the bankruptcy court, determined that the Direct Action suits seek *indirect* recovery from the proceeds of the insurance policies as a result of personal injuries caused by Manville products. *Id.* at 67. To support its conclusion, the district court relied on the bankruptcy court's factual determinations that the "gravamen of these suits is that Travelers learned of asbestos risks from its [policy-based] defense of Manville in asbestos-related claims, and failed to disclose or otherwise suppressed this knowledge" and that "essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos." *Id.* at 63-64 (citing FOF ¶¶ 11, 73-88; 2004 WL 1876046, at *5, 18-20).

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[18] Section 524(g)(4)(A)(ii) provides:

> [A]n injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . (III) the third party's provision of insurance to the debtor or a related party.

In our view, the jurisdictional analysis by the lower courts falls short for several reasons. In *MacArthur*, a Manville asbestos distributor ("MacArthur") sought a judicial declaration of coinsured status under "vendor endorsements" contained in Manville's policies. *MacArthur*, 837 F.2d at 90. This Court concluded that the 1986 orders prohibited MacArthur from calling on the endorsement for coverage after being sued for asbestos injuries caused by Manville products. *Id.* at 92-93. MacArthur insisted that its "vendor endorsement" claims were independent contractual claims against the non-debtor insurance companies that were therefore not within the jurisdictional reach of the 1986 orders. *Id.* at 92. We rejected that view, reasoning that the 1986 orders precluded suits against a significant asset of the bankruptcy estate—Manville's insurance policies[19]—and that MacArthur's coverage claim clearly affected that asset:

> The [vendor] endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies. [Plaintiff's] rights as an insured vendor are completely derivative of Manville's rights as the primary insured. . . . [Plaintiff] seek[s] to collect out of the proceeds of Manville's insur-

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[19] Title 28 U.S.C. § 1334(e)(1) grants "[t]he district court in which a case under title 11 is commenced . . . exclusive jurisdiction . . . (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

> ance policies on the basis of Manville's conduct. . . . [P]laintiff['s] claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets.

Id. at 92-93 (citation omitted). MacArthur's claim for defense and indemnification from the carrier would have reduced the amount of insurance available to satisfy claims against Manville. *Id.* at 92. Thus, MacArthur's claim for coverage was barred by the injunction and MacArthur was left to make a claim against the Manville Trust. *Id.* at 93-94.

The Fifth Circuit applied a similar analysis in *In re Davis*, 730 F.2d at 184. In *Davis*, 279 asbestos workers sued Travelers under a Louisiana statute that afforded injured persons "a right of direct action against the insurer within the terms and limits of the policy [that] may be brought against the insurer alone, or against both the insured and insurer jointly and in solido." La. Rev. Stat. § 22:655 (1984). The Louisiana direct action statute "does not create an independent cause of action against the insurer, it merely grants a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured." *Descant v. Adm'rs of Tulane Educ. Fund*, 639 So. 2d 246, 249 (La. 1994); *see also Cacamo v. Liberty Mut. Fire Ins. Co.*, 764 So. 2d 41, 43 (La. 2000). While the workers' cases were pending, Johns-Manville filed its bankruptcy petition, triggering the provisions of an automatic stay. *In re Davis*, 730 F.2d at 178. The Fifth Circuit refused to

vacate the stay for primarily the same reasons as those expressed by this Court in *MacArthur*. The Court noted that the bankruptcy court had the authority to "enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate" and that the insurance coverage served as a "bulwark against erosion of the estate." *Id.* at 184, 185.

The claims at issue in *MacArthur* and *Davis* differ significantly from the statutory and common law claims at issue here. Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies, *see MacArthur*, 837 F.2d at 92; *Davis*, 730 F.2d at 178. Moreover, the claims at issue here do not seek to collect on the basis of Manville's conduct. *Cf. MacArthur*, 837 F.2d at 92-93 ("[P]arties . . . seek to collect . . . on the basis of Manville's conduct."). Instead, the Plaintiffs seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct. (FOF ¶¶ 73-87; 2004 WL 1876046, at *18-20). Plaintiffs neither seek to recover insurance proceeds nor rely on the insurance policies for recovery.

The courts below appeared to view the jurisdictional inquiry as a factual one: if the direct actions "arose out of" or are "related to" the Manville-Travelers relationship, then the court had jurisdiction. But the factual determination was only half of the equation. The nature and

extent of Travelers' duty to the Direct Action plaintiffs is a function of state law. Neither court looked to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose.

For example, one group of statutory plaintiffs seeks "[d]amages for aggravation, inconvenience and frustration" based on Travelers' alleged violations of West Virginia's Unfair Trade Practices Act. *See* W. Va. Code § 33-11-4(9); Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001) (Docket No. 3415, Ex. L), at 95. Although the West Virginia Unfair Trade Practices Act "itself does not provide for damages for a violation of its provisions," the Supreme Court of Appeals of West Virginia has "identified the type of damages recoverable under the Act as including attorney's fees and even punitive damages." *Wilt v. State Auto. Mut. Ins. Co.*, 506 S.E.2d. 608, 609 n.4, 610 (W. Va. 1998).[20] Moreover, it is clear under West

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[20] The Clarifying Order also enjoins a number of actions filed in Massachusetts. Under Massachusetts law, a plaintiff may recover compensatory and punitive damages against an insurer under the Massachusetts Unfair Settlement Practices Act after settling with the underlying tortfeasor. *See Dattilo v. Arbella Mut. Ins. Co.*, No. 024510E, 2007 WL 1417870, at *1, 5-6 (Mass. Super. Ct. May 3, 2007) (citing *Columbia Chiropractic Group, Inc., v. Trust Ins. Co.*, 430 Mass. 60, 63 (1999) (attorney's fees incurred as a result of an insurer's wrongful failure to settle in violation of the Massachusetts unfair settlement practices act may be awarded as Mass. Gen. Law Chap. 93A damages and such

Virginia law that settlement of the underlying tort case against the tortfeasor does not preclude a separate and independent recovery against the tortfeasor's insurer arising out of its alleged bad faith insurance practices. *See Poling v. Motorists Mut. Ins. Co.*, 450 S.E.2d 635, 636-37 (W. Va. 1994) (answering a certified question and determining that a cause of action for insurance bad faith under W. Va. Code § 33-11-4(9) is not precluded by the settlement of the underlying tort case against the tortfeasor). Thus, it is evident that Plaintiffs' Direct Action claims constitute independent tort actions.[21]

The importance of how a state defines these types of claims cannot be overlooked. For example, as noted above, the claims involving Louisi-

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amount may be subject to punitive damages)); *see also* Complaint in *Gilchrist v. Am. Standard, Inc.*, No. 03-508628 (Ohio Ct. Com. Pl.), at 1-13, 101 (plaintiffs seek compensatory and punitive damages in relation to their common law claims for, *inter alia*, negligence, strict liability, and breach of express warranty).

[21] The parties have indicated that no court that has accepted the common law theories asserted in this case. *See* Brief of the State of Texas as Amicus Curiae, *In re St. Paul Fire & Marine Ins. Co.*, No. 01-06-00165-CV, 2006 WL 1403983, at *8 (Tex. Ct. App., filed Apr. 24, 2006) (citing *Bugg v. Am. Standard, Inc.*, No. 84829, 2005 WL 1245043 (Ohio Ct. App. May 26, 2005) (dismissing common law action for failure to state a claim); *Bope v. A.W. Chesterton Co.*, No. 85215, 2005 WL 2562913 (Ohio Ct. App. Oct. 13, 2005) (same); *In re Civil Action-Welding Rod*, No. 531703 *et al.*, 2006 WL 397951 (Ohio Ct. Com. Pl. Feb. 15, 2006) (same)). We note, however, that the states' unwillingness to recognize these actions does not vest a federal court with jurisdiction to enjoin all such future claims.

ana law are premised on a statute that provides a direct action against an insurer when the insured is insolvent. The recovery is against the policy and is thus limited to the coverage of the policy. *See* La. Rev. Stat. § 22:655(B)(1)(a)-(b). These were the type of claims in play in *Davis* and, in our view, *Davis* was correctly decided. To the extent the Clarifying Order limits claims based on that Louisiana statute the order is on sound jurisdictional ground.

However, the vast majority of the instant claims more closely resemble those at issue in *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). In *Zale*, the creditors' committee in Zale Corporation's ("Zale") bankruptcy planned to initiate tort and contract claims against Zale's officers and directors. *Id.* at 749-50. Cigna Insurance Company ("CIGNA") had issued Zale an insurance policy that provided primary coverage for Zale's officers and directors. *Id.* The National Union Fire Insurance Company ("NUFIC") had issued Zale an excess directors and officers liability policy, which provided coverage in excess of CIGNA's primary policy limits. *Id.* at 749 n.1. Eventually, various parties to the Zale bankruptcy filed a motion in the bankruptcy court seeking approval of a settlement agreement between Zale and CIGNA whereby certain Zale officers and directors would agree to a $32 million judgment to be satisfied solely out of insurance proceeds. *Id.* at 749. The bankruptcy court approved the settlement agreement, which included an injunction barring NUFIC from suing CIGNA for its actions relating to the settlement. *Id.* at 749-50. NUFIC challenged the

injunction, insisting that its bad faith tort claims against CIGNA did not "relate to" the bankruptcy for jurisdictional purposes because the claims were not property of the estate and had no effect on the estate. *Id.* at 755; *see* 28 U.S.C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to* cases under title 11." (emphasis added)).

The Fifth Circuit first observed that:

> Those cases in which courts have upheld "related to" jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy. . . . [T]he district court's desire to "foster and encourage and then preserve settlement in federal court" does not in and of itself confer jurisdiction.

Zale, 62 F.3d at 753-54 (internal citations and footnotes omitted). The issue before the court was "not whether the bankruptcy court had jurisdiction over the settlement and CIGNA, but whether

the bankruptcy court had jurisdiction over an attempt to enjoin actions between . . . NUFIC and CIGNA." *Id.* at 755. The Fifth Circuit concluded that NUFIC's bad faith tort claims were beyond the jurisdictional reach of the bankruptcy court.

> Because CIGNA, [the directors], and NUFIC are not debtors and because the property at issue—the bad faith claims—is not property of the estate, the bankruptcy court would have no jurisdiction over the tort claims . . . . Moreover, the tort claims do not implicate an independent obligation of Zale in favor of CIGNA. . . . For these reasons, the settlement cannot provide the basis for jurisdiction over the bad faith claims. Accordingly, CIGNA and Zale's attempt to establish jurisdiction fails, and the bankruptcy court had no jurisdiction over . . . NUFIC's tort actions against CIGNA.

Id. at 756-57 (internal citations and footnotes omitted). The Fifth Circuit thus vacated the approval of the settlement between Zale and CIGNA. *Id.* at 766.

The fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims.[22] Here, as in *Zale*,

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[22] The ancillary jurisdiction courts possess to enforce their own orders "is itself limited by the jurisdictional limits of the order sought to be enforced." *In re Fairchild Aircraft Corp.*, 184 B.R. 910, 916 (Bankr. W.D. Tex. 1995) (citing *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *Matter of Mooney Aircraft, Inc.*, 730 F.2d

Plaintiffs seek to recover directly from a debtor's insurer for the insurer's own independent wrongdoing. (FOF ¶¶ 73-87; 2004 WL 1876046, at *18-20). Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers.[23]

367, 374-75 (5th Cir. 1984)), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[23] *See also In re Elsinore Shore Assocs.*, 91 B.R. 238, 253-54 (Bankr. D. N.J. 1988) (rejecting debtors' proposed Chapter 11 reorganization plan that improperly called for creditors to release their claims against third-party nondebtors):

> [The debtor] contends that if a bankruptcy court has the power to enjoin suits against nondebtor third parties, as in [*MacArthur*], it has the power to order the release of claims. Such an interpretation and extension of the Second Circuit's holding is inappropriate. The bankruptcy court in [*MacArthur*] was dealing with claims against property of the estate . . . which are subject to the court's jurisdiction. . . . To extend the holding in [*MacArthur*] to this situation is based on neither law or logic. This court may properly invoke its jurisdiction over creditors of [the debtor] when these creditors' actions may effect property of the estate. However, for this court to delve into the rights of these creditors against third parties not before this court is an over-extension of this court's jurisdiction.

Id. at 253-54 (internal citations omitted).

II

The district court emphasized the bankruptcy court's declaration that its "repeated use of the term[s] 'arising out of' and 'related to' [was] not gratuitous or superfluous; they were meant to provide . . . global finality for Travelers . . . ." *In re Johns-Manville Corp.*, 340 B.R. at 60. But global finality is only as "global" as the bankruptcy court's jurisdiction. A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions. We have previously recognized that "a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). In finding it reasonable to broadly interpret the 1986 orders to enjoin the statutory and common law actions, the district court relied on the bankruptcy court's conclusion of law that "insurers would not contribute funds [to the Manville Trust] without receiving assurances that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." *In re Johns-Manville Corp.*, 340 B.R. at 61 (citing COL ¶ 20; 2004 WL 1876046, at *30) (alteration in original). It is, however, "precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuse foreseen" in *Metromedia*. *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006). Although the bankruptcy court had jurisdiction and au-

thority to enter the 1986 orders barring claims "based upon, arising out of or related to the Policies," (Insurance Settlement Order at 165, ¶ 23.1), it erred by subsequently interpreting those terms without reference to the court's jurisdictional limits.

It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate. If that were possible

> a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

In re Combustion Eng'g, Inc., 391 F.3d 190, 228 (3d Cir. 2004) (citation and quotation marks omitted).

Instead, a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate. In *MacArthur* we recognized that conclusion as the decisional pivot for both *MacArthur* and *Davis*. "[I]n both instances, third parties seek to collect out of the *proceeds* of Manville's insurance policies on the basis of Manville's conduct. . . . [P]laintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well

within the Bankruptcy Court's jurisdiction over Manville's assets." *MacArthur*, 837 F.2d at 92-93 (emphasis added).

The district court made particular note of the bankruptcy court's extensive factual findings regarding Manville's dominating presence in the asbestos industry, (FOF ¶¶ 1-11; 2004 WL 1876046, at *1-5), and its thirty-year involvement with Travelers, (FOF ¶¶ 12-50; 2004 WL 1876046, at *5-13). *In re Johns-Manville Corp.*, 340 B.R. at 64. The court embraced the bankruptcy court's factual findings that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville" and that "the Direct Action Claims against Travelers 'inescapably' relate to its insurance relationship with Manville." *Id.* (quoting (FOF ¶¶ 49-50; 2004 WL 1876046, at *13)). There is no doubt that these findings by the bankruptcy court document the *factual* origins of Travelers' alleged malfeasance. The factual findings are, however, only part of the liability equation. What remained was a legal determination: did Travelers owe a duty to the Direct Action Plaintiffs independent of its contractual obligations to indemnify those injured by the tortious conduct of Manville? If such a duty exists, then the fact that it arises from a common nucleus of operative facts involving Travelers and Manville (*e.g.*, the Manville/Travelers insurance relationship) is of little significance from a jurisdictional standpoint. As noted above, drawing the duty line is a function of state and not federal law. *See, e.g., Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232-40 (2001).

There is little doubt that, in a literal sense, the instant claims against Travelers "arise out of" its provision of insurance coverage to Manville. The bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion. (FOF ¶¶ 1-50; 2004 WL 1876046, at *1-13). However, the 1986 orders must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate.[24] Interpreting the orders otherwise risks federal bankruptcy courts "displac[ing] state courts for large categories of disputes in which some[one] . . . may be bankrupt." *Matter of Zale Corp.*, 62 F.3d at 755 (quoting *In re Kubly*, 818 F.2d 643, 645 (7th Cir. 1987)) (second alteration in original).

Section 524(g), enacted in response to the bankruptcy court's actions in earlier proceedings in this case, must be interpreted in the same manner. The legislation provides a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liabil-

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[24] A bankruptcy court is clearly without power to enjoin all claims that literally "arise out of" the insurance policies that Manville purchased from Travelers. Suppose, for example, that a plaintiff sued Travelers for suppressing information about the dangers of asbestos in relation to a policy it issued to another asbestos manufacturer. Although the knowledge that Travelers failed to disclose may have "arisen out of" its relationship with Manville, allowing a bankruptcy court to bar such claims because they literally "arise out of" that relationship would embody the abuse foreseen by this Court in *Metromedia*, 416 F.3d at 142.

ity. *See, e.g.*, H.R. Rep. 103-835, at 40, *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3348; *see also In re Combustion Eng'g, Inc.*, 391 F.3d at 234. Section 524(g) mandates the channeling of related claims to a personal injury trust, thereby relieving the debtor of the uncertainty of future asbestos liabilities and helping to achieve the purpose of Chapter 11 by facilitating the reorganization and rehabilitation of the debtor as an economically viable entity. *Id.* Section 524(g)(4)(A)(ii)(III) provides:

> Notwithstanding the provisions of section 524(e),[25] such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be *directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third parties arises by reason of* . . . (III) the third party's provision of insurance to the debtor . . . .

Id. (emphasis added).

The application of a § 524 injunction is limited to "situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor." *In re Combustion Eng'g, Inc.*, 391 F.3d at 234. The Third Circuit

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[25] Title 11 U.S.C. § 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

has noted that § 524(g)(4)(A)(ii) is consistent with the purposes underlying § 524(g):

> The channeling injunction issued in the Johns-Manville bankruptcy, after which § 524(g) was modeled, *see* 140 Cong. Rec. H10752, H10765 (1994) . . . was limited to third-party actions against non-debtors in which the liability alleged was derivative of the debtor. *See MacArthur Co. v. Johns-Manville*, 837 F.2d 92-93 (2d Cir. 1988) (explaining that the channeling injunction applied only to third parties [who] seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct).

Id. at 235 n.47 (citations and internal quotation marks omitted). As discussed above, the claims at issue here, unlike those in *Davis* and *MacArthur*, are not derivative of Manville's liability, but rather seek to recover directly from Travelers for its own alleged misconduct. While Congress enacted § 524(g) to reflect the injunction/channeling mechanism that the Manville bankruptcy court developed in response to various derivative claims, the provision was not intended to reach non-derivative claims. Because the claims here are non-derivative and have no effect on the *res*, they are outside the limits of § 524(g).

Conclusion

In our view, the district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct

and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate. The irony in all of this is that while the Direct Actions, with one categorical exception, involve a claim of an independent duty on the part of Travelers, they have met with almost universal failure in the state courts. Thus, while the bankruptcy court's order sought to achieve one-stop relief for Travelers that could be seen as well deserved, it seems to us there is not one but many courthouses where the legitimacy of these actions must be tested. The bankruptcy court's desire to facilitate global finality for Travelers may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists. The order of the district court is VACATED and the case REMANDED for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims.[26]

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[26] Travelers asserts that if any portion of the bankruptcy court's clarifying order is vacated then all of the relevant settlements will terminate. We offer no opinion on this matter and leave it to the parties, with the aid of the bankruptcy court, to determine the status of their settlements.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 8001(JGK)
March 28, 2006

In re JOHNS-MANVILLE CORP., *et al.*,

Debtors.

Order was entered by the Bankruptcy Court, Burton R. Lifland, J., approving postconfirmation settlement agreements and clarifying scope of bar order previously entered in connection with confirmation of Chapter 11 plan of bankrupt manufacturer of asbestos products. Non-settling insurers appealed.

The District Court, Koeltl, J., held that:

(1) non-settling insurers had standing to appeal;

(2) injunctive provision incorporated in previous order of bankruptcy court confirming debtor's proposed plan was broad enough to cover direct actions suits and related contribution and indemnification claims by insurers;

(3) bankruptcy court had jurisdiction over liability policies purchased by debtor,

and to protect those policies from being dissipated by direct action claims against the issuing insurer, by broadly enjoining such claims and channeling them into trust established under debtor's plan;

(4) court had no jurisdiction to enter "gatekeeping" order, to require third parties wishing to sue debtor's insurer to first obtain determination from bankruptcy court that their claims were unrelated to policies that insurer had issued to debtor; and

(5) decision to approve proposed settlement was not clear abuse of discretion.

Affirmed in part and vacated in part.

Frederick C. Schafrick, Jill Ilan Berger Inbar, Goodwin Procter LLP, Washington, DC, William P. Shelley, Cozen O'Connor, Philadelphia, PA, Sander Esserman, Stutzman, Bromberg, Esserman & Plifka, P.C., Dallas, TX, Bradley James Mortensen, Christie, Pabarue, Mortensen and Young, New York, NY, for Appellants.

Andrew Tyler Frankel, Barry Robert Ostrager, M.O. Sigal, Jr., Simpson Thacher & Bartlett LLP, Bonnie K. Steingart, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, Robert Jerrod Pfister, Simpson Thacher & Bartlett LLP, Los Angeles, CA, Karen A. Giannelli, Gibbons, Del Deo, Griffinger & Vecchione, P.C., Gibbons,

Del Deo, Griffinger & Vecchione, P.C., Newark, NJ, Ronald Barliant, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL, for Appellees.

OPINION & ORDER

KOELTL, District Judge.

This case relates to the bankruptcy of Johns-Manville Corporation ("Manville"), the world's largest supplier of asbestos. Under pressure from asbestos litigation, Manville filed for bankruptcy in August 1982 in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Since Manville's bankruptcy filing, asbestos plaintiffs have also tried to sue insurers of Manville, including Travelers Indemnity Company, Travelers Casualty and Surety Company, and their related entities (collectively, "Travelers"), who together were Manville's primary insurer. As part of Manville's reorganization plan, the Bankruptcy Court (Lifland, *Bankruptcy J.*) issued in 1986 an injunction that barred suits against Manville's insurers—including Travelers—and directed litigation by potential claimants instead against the Manville Personal Injury Settlement Trust. (Order Confirming Debtors' Second Amended and Restated Plan of Reorganization, dated Dec. 22, 1986 (Docket No. 3414) ("Confirmation Order").)

However, various groups of plaintiffs have since filed direct actions against Travelers and other insurers (the "Direct Action Suits"), arguing that the insurers had primary liability to

claimants because they misled potential claimants about the dangers of asbestos. These suits were brought under the statutory law of various states, including Hawaii, and under the common law. Three classes of plaintiffs thereafter settled with Travelers: the "Statutory Direct Action Plaintiffs," the "Hawaii Plaintiffs," and the "Common Law Plaintiffs" (collectively, the "Plaintiff Appellees"). The Bankruptcy Court granted Travelers' motion to approve the settlements.

In conjunction with the settlements—which totaled almost $500 million—and after an evidentiary hearing, the Bankruptcy Court issued a "Clarifying Order" on August 17, 2004 that made it plain that the Direct Action Suits against Travelers were barred by the original 1986 injunction, and barred further lawsuits against Travelers, including any claims for contribution or indemnity. (Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction, dated Aug. 17, 2004 (Docket No. 3751) ("Clarifying Order"), at ¶¶ 6-8, 10.) The Clarifying Order also included a judgment reduction provision that reduced the judgment obtained in Direct Action Suits against any objecting insurer by the greater of either a) the amount that the relevant plaintiff received in the settlement, or b) the amount that the non-settling insurer would have been entitled to obtain from Travelers in contribution or indemnity, had Travelers been a party to the litigation. The Bankruptcy Court supported its actions with its

Findings of Fact and Conclusions of Law Regarding Travelers Motions for Approval of Certain Settlement Agreements and for the Entry of a Clarifying Order, dated August 17, 2004 (Docket No. 3750), *available at* 2004 WL 1876046 (cited herein as "FOF" or "COL," or together, as the "Bankruptcy Court's Findings").

Continental Casualty Company ("Continental"), Chubb Indemnity Insurance Company ("Chubb"), and OneBeacon America Insurance Company ("OneBeacon") (collectively, the "Objecting Insurers") are other insurers who have objected to the settlement and have appealed from the Bankruptcy Court's Findings and Clarifying Order. Certain asbestos claimants ("Objecting Claimants") also have objected to the settlement and have appealed.[1] The appellants challenge, among other things, the subject matter jurisdiction of the Bankruptcy Court over Direct Action Suits against Travelers, a non-debtor. In turn, the Plaintiff Appellees have moved to dismiss the Objecting Insurers' appeals on the grounds of lack of standing.

I.

The facts in this case, catalogued in detail in the Bankruptcy Court's Findings of Fact, are as follows.

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[1] The Objecting Claimants identify themselves as the "Asbestos Personal Injury Plaintiffs," who are six individual claimants, and the "Cascino Asbestos Claimants," who are represented by Michael Cascino, Esq. (Objecting Claimants Brief at 1, nn. 1 and 2.)

A.

Manville was the world's largest producer of asbestos. (FOF at ¶ 3; 2004 WL 1876046, at *2.) Faced with overwhelming asbestos-related litigation, on August 26, 1982 Manville filed a voluntary petition for reorganization under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Four years later, on December 22, 1986, the Bankruptcy Court entered an order confirming Manville's Second Amended and Restated Plan of Reorganization (the "Plan"), which established the Manville Personal Injury Settlement Trust ("Manville Trust") to pay personal injury claims arising from exposure to asbestos. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640-41 (2d Cir.1988) (describing the Plan, which was upheld on appeal). This Confirmation Order also incorporated by reference provisions from an insurance settlement order previously issued by the Bankruptcy Court on December 18, 2006 ("Insurance Settlement Order"), which enjoined insurance policy-related litigation against certain insurers of Manville, including Travelers. (FOF ¶¶ 61-63; 2004 WL 1876046, at *15-16.)

Travelers was Manville's primary insurer from 1947 through 1976, providing comprehensive general liability coverage and other insurance policies. *See In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr.S.D.N.Y.1983). Over the course of the Manville insurance relationship, Travelers investigated asbestos claims, funded litigation defense efforts, and learned about the risks of asbestos. After reviewing considerable

testimony and evidence of Travelers' involvement in Manville's asbestos cases, the Bankruptcy Court concluded as a factual matter that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." (FOF ¶ 50; 2004 WL 1876046, at *13.) While other Travelers policyholders also faced asbestos litigation, the Bankruptcy Court rejected allegations from other parties that Travelers learned of any asbestos risks from other sources that it did not already know from the Manville relationship. (*See* Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkely County) (Docket No. 3415, Ex. L), at ¶¶ 79-110 (a Direct Action Suit alleging Travelers' knowledge from other sources).)

Soon after Manville filed for bankruptcy, Travelers and other Manville insurers became enmeshed in so-called "direct action" suits by asbestos plaintiffs. Manville factory workers sued Travelers pursuant to the Louisiana Direct Action Statute, La R.S. 22:655. (FOF ¶ 55; 2004 WL 1876046, at *14, citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims against Manville's insurers).) Travelers also faced claims from vendors of Manville products, who claimed that Travelers owed duties arising out of its insurance policies and relationship with Manville. (FOF ¶ 56; 2004 WL 1876046, at *14, citing *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90-91 (2d Cir.1988) (discussing one such claim).) There were also a host of contribution claims, cross claims, and indemnity claims between and among virtually every company that

had insured Manville in its long history. (FOF ¶ 57; 2004 WL 1876046, at *15.) Finally, Travelers and the other insurers were embroiled in a contentious coverage dispute with Manville.

The Insurance Settlement Order, considered the "cornerstone" of the Manville reorganization, involved Travelers contributing nearly $80 million to the bankruptcy estate in exchange for an injunction that channeled all claims related to policy claims to the Manville Trust and a complete release for Travelers of liabilities that were related to or based on Manville. (FOF ¶¶ 58-61; 2004 WL 1876046, at *15.) With the Insurance Settlement Order and the Confirmation Order (together, the "1986 Orders"), Travelers thought it had secured finality and a full and complete release of liabilities related to Manville.

B.

Nonetheless, various groups of plaintiffs afterwards filed the Direct Action Suits against Travelers (as well as other Manville insurers). The Statutory Direct Action Plaintiffs filed suit in various states, including Hawaii, alleging that Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices. They also allege that Travelers was responsible for coordination of the national defense effort against asbestos litigation and its allegedly fraudulent perpetuation of the "state of the art" defense. (*Id.* at ¶¶ 73-79; 2004 WL 1876046, at *18-19.) The Common Law Plaintiffs allege that Travelers violated certain common law duties to them when it failed to disclose what

it had learned about asbestos hazards from Manville, and that Travelers conspired with Manville and other insurers to suppress such knowledge. (*Id.* at ¶¶ 80-88; 2004 WL 1876046, at *18-1[illegible]

On [illegible]ne 19, 2002, Travelers moved the Bankruptcy Court to enjoin these suits pursuant to the 1986 Orders. The Bankruptcy Court issued a temporary restraining order prohibiting further prosecution of certain lawsuits against Travelers, and this order was subsequently extended in scope and duration. (*Id.* at 1; 2004 WL 1876046, at *1.) The Bankruptcy Court held a series of hearings on the motion, and on August 1, 2002 referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor of the State of New York, as mediator. The result of the mediation was that in November 2003, Travelers entered into a settlement agreement with the Statutory Direct Action Plaintiffs pursuant to which Travelers agreed to pay $360 million. (*Id.* at ¶ 96; 2004 WL 1876046, at *22.) In May 2004, Travelers settled with the Common Law Plaintiffs for $70 million, and settled with the Hawaii Plaintiffs for $15 million. (*Id.* at ¶¶ 101, 105; 2004 WL 1876046, at *22-23.) The settlements provided for the creation of separate funds to compensate the plaintiffs in each of the respective classes. (*Id.* at ¶¶ 98, 102, 105; 2004 WL 1876046, at *22-23.) These settlements were conditioned upon the entry of an order by the Bankruptcy Court to clarify that the Direct Action Suits were always prohibited by the 1986 Orders.

Continental, Chubb, OneBeacon, and the Objecting Claimants filed objections to the approval of these settlements in the Bankruptcy Court. Continental, a Manville insurer that was also sued in the Direct Action Suits, argued that the Bankruptcy Court did not have subject matter jurisdiction to bar its contribution and indemnification claims against Travelers. Chubb, a non-Manville insurer also sued in Direct Action Suits, similarly objected. OneBeacon, one of the Manville insurers who settled in 1986 and who was allegedly covered by the 1986 Orders, argued that the injunction should protect it from Direct Action Suits as well. The Objecting Claimants complained of defects in the settlement with the Common Law Plaintiffs.

The Bankruptcy Court held an evidentiary hearing on the proposed settlements on July 6, 2004, and issued the Clarifying Order and the Bankruptcy Court's Findings on August 17, 2004. These appeals followed.

II.

The Court first addresses the Plaintiff Appellees' motions to dismiss the appeals of Continental, Chubb, and OneBeacon for lack of standing. The Plaintiff Appellees essentially argue that because the Objecting Insurers are protected by the judgment reduction provision, they suffer no injury from the Clarifying Order, and thus have no standing to appeal.

The appellants bear the burden of demonstrating that they have standing. *In re School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir.

1990). "To establish standing to appeal a settlement, a non-settling defendant may not merely claim an interest in the lawsuit but must show some cognizable prejudice to a legal relationship between it and the settling parties." *Id.* The appellant must be a "person aggrieved"—"a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court." *Int'l Trade Admin. v. Rensselaer Polytechnic Institute,* 936 F.2d 744, 747 (2d Cir.1991) (internal citation and quotation marks omitted); *see also In re Combustion Engineering, Inc.,* 391 F.3d 190, 214 (3d Cir.2004); *In re PWS Holding Corp.,* 228 F.3d 224, 248 (3d Cir.2000). The "person aggrieved" standard is more stringent than the constitutional test for standing. *Combustion Engineering,* 391 F.3d at 215; *PWS Holding,* 228 F.3d at 248.

The Plaintiff Appellees argue that the Objecting Insurers have failed to show that they are "persons aggrieved" by the Clarifying Order, because even if the insurers' potential contribution or indemnity actions against Travelers are barred, the judgment reduction provision protects the insurers' interests.[2] The Plaintiff

[2] The relevant judgment reduction provision in Paragraph 14 of the Clarifying Order states:

> Any judgment obtained against . . . any objecting insurer . . . regardless of whether such Insurer was a settling Manville insurer, with respect to any claim asserted in any lawsuit that is enjoined as to Travelers and not enjoined as to said Insurer shall be reduced by the greater of: (a) the amount (if any) the Claimant has recovered or is entitled to recover from the Statutory Direct Action Settlement Fund and/or the Hawaii Direct Action Settlement Fund and/or the Common Law Direct Action Settlement Fund to the

Appellees contend that this judgment reduction provision is similar to the one in *School Asbestos,* where the Third Circuit Court of Appeals held that appellants did not have standing to challenge a settlement that "recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have." *School Asbestos,* 921 F.2d at 1333. The Plaintiff Appellees also rely on *Zupnick v. Fogel,* 989 F.2d 93 (2d Cir.1993), which rejected standing to challenge a settlement with a judgment reduction provision, but that case is inapplicable because that settlement agreement was not binding on the non-settling defendants. *Id.* at 99.

Neither the settlements in *School Asbestos* nor *Zupnick* included a bar order extinguishing the non-settling defendants' indemnification and contribution rights, which the Third Circuit Court of Appeals later ruled did create a "cognizable prejudice" that permitted standing to appeal a settlement. *Eichenholtz v. Brennan,* 52 F.3d 478, 482-83 (3d Cir.1995); *see also In re Orthopedic Bone Screw Products Liability Litig.,* MDL No. 1014, 1997 WL 164237, at *4 (E.D.Pa. March 26, 1997) (finding standing to challenge a settlement

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extent that the Insurer is entitled to such a reduction for that amount under the applicable state law; or (b) to the extent permitted under applicable state law, the amount or percentage (up to 100%) that the Insurer would have been able to recover from Travelers, whether by contribution, indemnity or otherwise under applicable state law, had Travelers been joined in said lawsuit and/or sued for indemnity and/or contribution in a separate lawsuit.

that included a bar order and a judgment reduction provision, and distinguishing *School Asbestos* as not containing a bar order).

The Plaintiff Appellees also cite several other cases upholding settlements that contain bar orders and judgment reduction provisions, but these cases did not involve a challenge to the appellants' standing. *See, e.g., Gerber v. MTC Electronic Technologies Co., Ltd.*, 329 F.3d 297, 306 (2d Cir.2003) (finding that "judgment credit adequately compensates the non-settling defendants for their indemnity and contribution claims"); *In re Worldcom, Inc. ERISA Litig.*, 339 F.Supp.2d 561, 568 (S.D.N.Y.2004) (noting that courts may approve settlement with bar orders as long as there is a proper set-off provision). Other cases cited by the parties rejected on the merits settlements with bar orders and judgment reduction provisions because non-settling defendants were not adequately compensated for the bar against contribution and indemnification claims. *See, e.g., In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1032-33 (2d Cir.1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 161 (4th Cir.1991).

These cases demonstrate that the question of whether a judgment reduction provision compensates for a bar order against contribution and indemnification claims is a question on the merits of the settlement, and not an issue of standing. *Cf. Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 751 n. 13 (5th Cir.1995) ("[T]he fact that the injunction bars NUFIC and Feld in any way gives them standing to appeal it."). For example, in *Eichenholtz*, the Court of Appeals

found that non-settling defendants had standing to appeal, even though it ultimately found on the merits that the judgment reduction provision adequately compensated for the bar order. *Eichenholtz,* 52 F.3d at 483, 487.

The Ninth Circuit Court of Appeals interpreted *School Asbestos* and *Zupnick* as holding that it is possible that "a judgment reduction credit may divest non-settling defendants of standing if it is written in such a way as to ameliorate any harm caused by other provisions in the settlement agreement." *Smith v. Arthur Andersen LLP,* 421 F.3d 989, 1000 (9th Cir.2005). But *Smith* also recognized that measuring any alleged harm from an inadequate judgment reduction provision was still a question of merits, and that standing may be accepted by considering the appellants' allegations of the provision's inadequacy on their face. *Id.* at 1001 ("We are not reviewing an order entering summary judgment or dismissing a complaint, where a more searching inquiry into the factual and legal basis of a claim might be productive."). In *Smith,* the Court of Appeals found standing to challenge a bar order despite a judgment reduction provision because the appellants alleged the provision failed to compensate for the elimination of " 'indemnity or other [ ]' claims." *Id.* The Court of Appeals noted that the fact that appellants "have not articulated the precise nature of the 'indemnity or other [ ]' claims they are barred from asserting does not demonstrate a lack of formal legal prejudice." *Id.*

Here, the Objecting Insurers raise several arguments concerning why the judgment reduction provision in the Clarifying Order is inade-

quate to compensate for the bar order. Among other things, the Objecting Insurers argue that the Clarifying Order is potentially unenforceable, would fail to provide the appropriate set-off in certain jurisdictions, and limits their ability to obtain necessary discovery against Travelers. While the Plaintiff Appellees dispute these claims, such arguments go to the merits of the appeal, and not to the question of standing.[3]

The motions to dismiss the appeals are denied.

III.

The Court next addresses the merits of the various appeals. Continental, Chubb, OneBeacon, and the Objecting Claimants appeal from the Bankruptcy Court's Findings (Docket No. 3750) and the Clarifying Order approving the Traveler's settlement (Docket No. 3751). The Court reviews conclusions of law by the Bankruptcy Court *de novo*, but accepts the Bankruptcy Court's findings of facts unless "clearly erroneous." *See* Fed. R. Bankr.P. 8013; *In re Halstead Energy Corp.*, 367 F.3d 110, 114 (2d Cir.2004).

[3] OneBeacon makes the separate argument that it has standing to appeal the Clarifying Order based on the Order's failure to provide similar protection for OneBeacon from Direct Action Suits. Chubb makes the separate argument that it has standing to challenge the order purporting to clarify the 1986 injunction because it never had the opportunity to challenge the original injunction. Because the Court finds that all the Objecting Insurers have standing because of alleged cognizable prejudice from the bar order, the Court need not address these separate arguments for standing purposes.

A.

Appellants Continental, Chubb, and the Objecting Claimants argue that the Bankruptcy Court did not have subject matter jurisdiction to issue its injunction barring suits against Travelers in the Clarifying Order. A bankruptcy court's subject matter jurisdiction is limited to controversies "arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 157(a); *see also* 28 U.S.C. § 1334(b).

As an initial clarification, the Objecting Claimants incorrectly argue that there can be no "related to" jurisdiction for the 2004 Clarifying Order, because post-confirmation, there was no longer a Manville bankruptcy estate for the dispute to "relate to." (Objecting Claimants Brief at 15-16, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir.1984).) However, neither the Bankruptcy Court nor the appellees invoke "related to" jurisdiction as a basis for the Clarifying Order. Instead, the Bankruptcy Court held that it was "enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction" of the previous 1986 Orders. (COL ¶ 8; 2004 WL 1876046, at *28.) "A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization." *In re Petrie Retail, Inc.*, 304 F.3d 223, 230 (2d Cir.2002). In confirming the Plan, the Bankruptcy Court explicitly retained jurisdiction to enforce its orders and injunctions. (Confirmation Order ¶ 28.) The Objecting Claimants' argument notwithstanding, the parties agree

that the Bankruptcy Court had subject matter jurisdiction to interpret and enforce the 1986 Orders. (Tr. of Feb. 22, 2006 hearing, at 22.)

Thus, the gravamen of the appellants' challenge to subject matter jurisdiction is that the injunction in the Clarifying Order is broader than the 1986 Orders, and that, even if the 1986 Orders contemplated Direct Action Suits, the Bankruptcy Court had no jurisdiction in 1986 to bar such suits. This challenge raises three issues. First, the Court must determine whether the Bankruptcy Court's conclusion of law that the Direct Action Suits violated the 1986 Orders was correct. Second, the Court must determine whether the Bankruptcy Court had subject matter jurisdiction in 1986 to enjoin Direct Action Suits. Third, if jurisdiction is established, the Court must determine its scope with respect to approving settlements, imposing "gate-keeping" requirements, and enjoining Direct Actions Suits not involving Manville.

1.

The first issue is whether the Bankruptcy Court correctly concluded that the Direct Actions Suits and any related contribution and indemnification claims were covered by the 1986 Orders.[4] (*See* COL ¶¶ 25-35; 2004 WL 1876046, at

[4] The parties dispute which standard of review to use to evaluate the Bankruptcy Court's conclusion. The appellees argue that a judge's interpretation of the judge's own order is accorded deference and "will not be disturbed 'absent a clear abuse of discretion.'" *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir.1995) (per curiam) (citation omit-

*32-34.) The Bankruptcy Court found that the Direct Action Suits violated the Insurance Settlement Order, which was incorporated into the Confirmation Order.[5] The relevant provision of the Insurance Settlement Order provided:

> [A]ll Persons are permanently restrained and enjoined from commencing and/or continuing *any suit, arbitration or other proceeding of any type or nature* for Policy Claims against any or all members of the Settling Insurer

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ted, also noting that it is "peculiarly within the province of the district court . . . to determine the meaning of its own order"). The appellants counter that the Bankruptcy Court's interpretation of its own Confirmation Order should not be given such weight, because the "Bankruptcy Court's interpretation of the text of the Plan, the Confirmation Order, and the Final Decree are conclusions of law reviewed *de novo*." *In re Duplan Corp.*, 212 F.3d 144, 151 (2d Cir.2000) (citing *Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co.*, 903 F.2d 910, 912 (2d Cir.1990) ("The proper standard for appellate review of a pure textual construction by the district court, whatever the procedural posture of the case, is *de novo*."). It is unnecessary to resolve this dispute because the clear language of the 1986 Orders supports the Bankruptcy Court's conclusion even under *de novo* review.

[5] The Objecting Claimants argue that the relevant injunction language from the Insurance Settlement Order was not incorporated in the Confirmation Order, and was thus abandoned. This argument has no merit. As the Bankruptcy Court concluded in its Findings of Fact, the Insurance Settlement Order was specifically incorporated in Paragraph (gg) of the Confirmation Order. (FOF ¶63; 2004 WL 1876046, at *16.) Moreover, the Second Circuit Court of Appeals, in upholding the very same injunction in *MacArthur*, cited the language from the Insurance Settlement Order as being in effect. *MacArthur*, 837 F.2d at 91.

> Group [which includes Travelers Indemnity Company and its affiliates] . . . .

(Insurance Settlement Order dated Dec. 16, 1986, at 172, ¶ 23.2(F) (emphasis added), attached as Exhibit D to Docket No. 3414.) The same Order defines "Policy Claims" broadly as:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group *based upon, arising out of or relating to any or all of the [insurance policies].*

(Insurance Settlement Order at 165, ¶ 23.1 (emphasis added).) Given the broad language used in the order to describe barred suits—all suits "based upon, arising out of or relating to any or all" of the insurance policies—a plain reading shows that this would include the Direct Action Suits. As the Bankruptcy Court concluded: "The Court's repeated use of the term 'arising out of' and 'related to' were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate." (COL ¶ 23; 2004 WL 1876046, at *31.) The gravamen of the Direct Action Suits were acts or omissions by Travelers arising from or relating to the Travelers' insurance coverage of Manville. (COL ¶ 25; 2004 WL 1876046, at *32.)

The Bankruptcy Court also concluded that the Direct Action Suits violated additional provisions in the Confirmation Order, which provided that:

> All Persons and Government Units are hereby stayed, restrained and enjoined from taking one or more of the following actions for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation[6] [including] . . . [c]ommencing, conducting, or continuing in any manner, *directly or indirectly*, any suit, action or other proceeding (including without limitation any thereof in a judicial, arbitral, administrative or other forum) against or affecting Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or *any of the Settling Insurance Companies* or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor . . . .

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[6] The term "Other Asbestos Obligation" is defined in Exhibit A to the Plan as:

> (a) all debts, obligations or liabilities (under any theory of law, equity or admiralty) . . . for death, personal injuries or personal damages (whether physical, emotional or otherwise) to the extent caused, directly or indirectly, by exposure to asbestos (alone or as contained in asbestos-containing products) and arising or allegedly arising, directly or indirectly, from acts or omissions prior to the Confirmation Date of one or more of the Debtors including, without limitation, all obligations or liabilities

(Confirmation Order at ¶ 29 (emphasis added).) The Direct Action Suits are actions against one of the "Settling Insurance Companies" to receive payment on an "Other Asbestos Obligation," and thus barred by the Confirmation Order as well. The Bankruptcy Court explained that if the Direct Action plaintiffs had been compensated 100% by Manville or the Manville Trust, they would have had no economic basis to bring claims against Travelers for its Manville-related conduct. It was only because those claimants were compensated less than 100% that they sought further compensation from Travelers. But the possibility of seeking additional compensation from Travelers for such claims was foreclosed by the broad injunction entered in the Confirmation Order. (COL ¶¶ 30-32; 2004 WL 1876046, at *33.)

It is reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville Plan. The Bankruptcy Court "understood that insurers

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for compensatory damages (such as loss of consortium, wrongful death, survivorship, proximate, consequential, general and special damages) and punitive damages and (b) all warranty, guarantee, indemnification or contribution liabilities or obligations, if any, of any of the Debtors to any other Person to the extent that such warranties, guarantees, indemnifications or contribution responsibilities cover claims against such other Person that would, if such claims had been made directly against any of the Debtors, constitute Other Asbestos Obligations under Clause (a) above.

(Docket No. 3415, Ex. H.)

would not contribute funds [to the Manville Trust] without receiving assurances that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." (COL ¶ 20; 2004 WL 1876046, at *30.) This conclusion is bolstered by the fact that even in 1986, Travelers was already enmeshed in direct action litigation in Louisiana. (FOF ¶ 55; 2004 WL 1876046, at *14), citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims by Manville factory workers against Travelers); *see also In re Johns-Manville Corp.*, 33 B.R. 254, 265 (Bankr.S.D.N.Y.1983) ("Direct action suits have been filed, and in Louisiana there are almost two hundred, in which Travelers has been named as a party Defendant.")

Similarly, the contribution and indemnity claims of the Objecting Insurers were barred by the same broad provisions of the 1986 Orders. The 1986 Orders applied to "all Persons," and were not limited to individual plaintiffs with asbestos-related injuries. The Orders also provided protection from other insurance companies who sought to hold Travelers liable indirectly for the damages that it could not be held directly liable to the individual claimants. The other insurance companies were precluded from suing Travelers for claims "based upon, arising out of, or relating to any or all of the [insurance policies]." (Insurance Settlement Order at 165, ¶ 23.1; *see also* COL ¶¶ 34-35; 2004 WL 1876046, at *33-34.)

Therefore, the Bankruptcy Court correctly interpreted its own 1986 Orders as covering the

Direct Action Suits and the related contribution and indemnification claims.

2.

Having determined that the 1986 Orders covered the suits at issue, the next issue is whether the 1986 Orders themselves were proper exercises of jurisdiction over non-debtors. The starting point for the resolution of this issue is *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.1988), which the Bankruptcy Court cites as having already considered and rejected a jurisdictional challenge to the 1986 Orders. (COL ¶¶ 8-9; 2004 WL 1876046, at *28.)

In *MacArthur*, the plaintiff alleged it was a coinsured under some of Manville's insurance polices pursuant to "vendor endorsements" contained in the policies. *MacArthur*, 837 F.2d at 90. The plaintiff argued that its "vendor endorsement" claims against the settling Manville insurers were too remote from the Chapter 11 proceedings for the Bankruptcy Court to exercise jurisdiction, and thus the 1986 Orders could not be enforced against it. The plaintiff characterized its interest in the vendor endorsements as contractual claims against the non-debtor insurance companies over which the Bankruptcy Court had no jurisdiction. The Second Circuit Court of Appeal held the plaintiff's claims were essentially derivative claims against the Manville insurance policies, which were property of the estate. *Id.* at 92. The Court of Appeals concluded that the Bankruptcy Court's broad jurisdiction over the property of the estate gave it jurisdic-

tion over the plaintiff's claims. *Id.* at 93; *see also* 28 U.S.C. 1334(e) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.")

The Court of Appeals has since reaffirmed its analysis with regards to the 1986 Orders. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 643 n. 4 (2d Cir.1988) ("Kane also challenges the Injunction on the ground that it grants a discharge to non-debtor parties, who are not entitled to the protection of Chapter 11, specifically Manville's insurers and certain Manville subsidiaries. We have recently determined that the insurers may lawfully be protected from asbestos-related claims.") (citing *MacArthur*); *see also In re Joint Eastern and Southern Dist. Asbestos Litig.*, No. 95-5008, 1996 WL 77954, at *2 (2d Cir.1996) (unpublished opinion regarding the same 1986 Orders) ("O'Malley's challenge to the Trial Courts' reaffirmation and continuation of the bankruptcy court's 1986 order enjoining suits against Manville and its insurers is without merit. Such an injunction is essential to the success of the Settlement, and its continuation was well within the discretion of the Trial Courts.") (citing *Kane* and *MacArthur*).

As part of its analysis, the *MacArthur* court compared the plaintiff's claims to "claims by asbestos victims against Manville's insurers in jurisdictions allowing direct actions against the insurers," which could properly be enjoined because judgment against the insurers would

reduce the proceeds recoverable from the insurance policies, thus affecting the debtor's estate. *MacArthur*, 837 F.2d at 92 (citing *GAF Corp. v. Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984)). The Court of Appeals also adopted the reasoning of *In re Davis*, 730 F.2d 176, 183-84 (5th Cir.1984) (per curiam) (rejecting claim that direct actions against insurers have no reasonable nexus with bankruptcy proceedings).

In *Davis*, the Fifth Circuit Court of Appeals found that insurance policies fell within the definition of "property of the estate" in 11 U.S.C. § 541(a)(1), thus establishing jurisdiction over "direct action" claims that would diminish those policies. *Id.* at 184. The Court of Appeals refused to lift a stay of direct actions against Manville insurers because the "bankruptcy court . . . has authority to issue a stay order intended to shield the insurers of Johns-Manville and its executives if the insurance policies constitute 'property of the estate.'" *Id.* Other courts have also adopted *Davis*' analysis. *See, e.g., In re Forty-Eight Insulations, Inc.*, 54 B.R. 905, 908-09 (Bankr.Ill.1985) (citing *Davis* and finding that direct actions suits under Illinois Insurance Code § 378 against insurers of a debtor asbestos product manufacturer violated the automatic stay because insurance policies are property of the debtor's estate).

It is clear from *MacArthur* and *Davis* that the Bankruptcy Court had jurisdiction over Travelers' insurance policies, and could act to protect them from dissipation by direct action claims by enjoining those claims and channeling them into the Manville Trust, into which the proceeds of

the insurance settlement were also channeled. Suits that seek direct recovery authorized by state statutes from Travelers' insurance policies would reduce the estate's recovery from those policies, thus affecting the "property of the estate." Moreover, direct action claims that are derivative of the right to recover under these policies—such as claims for negligent undertaking or failure to settle—can similarly be enjoined to protect the property of the estate. *Cf. MacArthur*, 837 F.2d at 92 (approving the injunction against MacArthur's vendor endorsement claims because they were derivative of Manville's rights as the primary insured: "Such derivative rights are no different in this respect from those of the asbestos victims who have already been barred from asserting direct actions against the insurers.") Thus, the 1986 Orders had subject matter jurisdiction to enjoin these types of direct action claims.

This conclusion is also supported by legislation enacted by Congress that explicitly authorized bankruptcy court injunctions barring derivative claims against third party insurers. The Bankruptcy Reform Act of 1994 added to the Bankruptcy Code a new section 524(g), which was modeled on the Manville injunction.[7] Section 524(g)(4)(A)(ii) provides:

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[7] The legislative history indicates that Congress modeled § 524(g) on the channeling injunction in the Johns-Manville case, and sought to strengthen the Manville injunction mechanisms through this codification without having to reopen its case. *See* H.R. Rep. 103-835, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3349.

> [A]n injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party . . . .

11 U.S.C. § 524(g)(4)(A)(ii). Congress thus explicitly indicated that the Bankruptcy Court's subject matter jurisdiction extended to claims against third party insurers arising from their insurance relationship with the debtor tortfeasor. Therefore, the Bankruptcy Court has jurisdiction over any claim arising from Travelers' insurance relationship with Manville by plaintiffs injured by Manville asbestos.

The appellants argue that the Direct Action Suits at issue here—unlike the direct actions pending at the time of the 1986 Orders—do not seek the proceeds of the insurance policies nor involve injuries from Manville products, but rather allege that Travelers breached its statutory duties or engaged in independent tortious conduct in defending insureds other than Manville.[8] While they attempt to characterize the Direct Action Suits as being unrelated to Manville, the Bankruptcy Court found as a fact that the gravamen of these suits is that Travel-

[8] The plaintiffs have candidly admitted that many of these theories of liability have never been accepted by any court. (FOF ¶ 81; 2004 WL 1876046, at *19.)

ers learned of asbestos risks from its defense of Manville in asbestos-related claims, and failed to disclose or otherwise had suppressed this knowledge. (FOF at ¶¶ 73-88; 2004 WL 1876046, at *18-20.) Moreover, while appellants characterize the Direct Action Suits as not stemming from injuries by Manville products, the Bankruptcy Court concluded "as a factual matter, that essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos through Manville's pervasive asbestos mining, processing and manufacturing activities." (*Id.* at ¶ 11; 2004 WL 1876046, at *5.) The Bankruptcy Court then rejected the notion that plaintiffs could remove the connection to Manville by artful pleading:

> After the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term "Manville" from their complaints—but leaving the substance unchanged.

(*Id.* at ¶ 89; 2004 WL 1876046, at *21.)

The Bankruptcy Court considered the appellants' reference to Travelers' conduct regarding other policyholders, but "other than the acknowledgement of the undisputed fact that there were other such insureds, the Court was not presented with a scintilla of evidence regarding the scope, duration or intensity of any such relationship." (*Id.* at ¶ 49; 2004 WL 1876046, at *13.) The Bankruptcy Court factually concluded that

"Travelers learned virtually everything it knew about asbestos from its relationship with Manville," and accepted the "unrebutted" expert testimony of Professor George Priest, "a recognized expert in insurance litigation," that "the Direct Action Claims against Travelers 'inescapabl[y]' relate to its insurance relationship with Manville." (*Id.* at ¶¶ 49-50; 2004 WL 1876046, at *13.) The Bankruptcy Court also factually concluded that Travelers' conduct in defending against Manville asbestos claims was directly related to the insurance policies:

> Every dollar paid by Travelers on account of Manville—whether to Manville itself, to outside defense counsel hired to defend Manville, to Travelers employees inspecting or investigating Manville facilities or claims, or to asbestos claimants in satisfaction of judgments against or settlements with Manville—correlated to a specific provision in the policies that Travelers issued to Manville.

(*Id.* at ¶ 48; 2004 WL 1876046, at *13.) Because Travelers' knowledge of asbestos and conduct in defending Manville arises from the Manville insurance policies, and because the Direct Action claimants were attempting to recover additional funds for asbestos claims that they were unable to collect from the Manville Trust, the Bankruptcy Court concluded that the Direct Action Suits were, in fact, creatively pleaded attempts to collect indirectly against the Manville insurance policies, and that barring

these claims was a proper exercise of jurisdiction. (COL ¶¶ 25-32; 2004 WL 1876046, at *32-33.)

This analysis is persuasive and unrebutted by the appellants.[9] Thus, the Court affirms the Bankruptcy Court's conclusion that it had jurisdiction in 1986 to enjoin the Direct Action Suits.[10] The Court also notes that Judge Lynch appeared to conclude similarly when rejecting a jurisdictional challenge to the June 24, 2003 preliminary injunction issued by the Bankruptcy Court temporarily enjoining the same Direct Action Suits at issue here. *See Carter v. Travelers Indemnity Co. (In re Johns-Manville Corp.)*, No. 03 Civ. 7173, 2004 WL 385118, *2 (S.D.N.Y. March 2, 2004) (plaintiff's "challenge to the bankruptcy court's jurisdiction is completely without merit").

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[9] Continental challenges the factual finding that Travelers learned "virtually everything" about asbestos from Manville, citing a single complaint that alleges that Travelers learned of the hazards of asbestos from other sources. (*See* Complaint in *Wise v. Travelers Indemnity Co.*, No. 01-C-599 (W.Va.Cir.Ct.) ¶¶ 79-110.) However, unproven allegations in a complaint fail to meet the heavy burden of showing "clear error" in the Bankruptcy Court's factual findings.

[10] It also follows that because the Bankruptcy Court had jurisdiction to enjoin the Direct Action Suits, it had jurisdiction to enjoin the claims by other insurers against Travelers for contribution or indemnity. Those claims are indirect efforts to hold Travelers liable for the same claims which the Bankruptcy Court had the power to enjoin.

3.

A final step remains, however, in determining whether the Bankruptcy Court's subject matter jurisdiction permitted other disputed provisions of the Clarifying Order, particularly the approval of the settlement of the Direct Action Suits and the "gate-keeping" provision. The appellants also raise the possibility that the Clarifying Order impermissibly bars suits involving Travelers' conduct with respect to insureds other than Manville and asbestos injury completely unrelated to Manville. In light of the Bankruptcy Court's extensive factual findings regarding the breadth of Traveler's conduct on behalf of Manville and the pervasiveness of Manville's asbestos, the Court finds that such a possibility is unlikely.

Nonetheless, the jurisdictional analysis above makes clear that the Bankruptcy Court has no jurisdiction to bar a suit alleging tortious conduct by Travelers on behalf of a non-Manville insured, conduct that is unrelated to Manville and not based on any knowledge of asbestos hazard gained from Manville, and that did not involve Manville asbestos or asbestos products. Indeed, the Bankruptcy Court itself recognized the limits of its jurisdiction in the Clarifying Order by providing that:

> [N]othing in this Order shall enjoin . . . claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers [sic] alleged liability or the proof required to establish Travelers [sic] alleged liability is unrelated

> to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers [sic] insurance relationship with Manville . . . .

(Clarifying Order ¶ 9(b).) The Clarifying Order also made clear that it was not enjoining "claims against Travelers by policyholders other than Manville . . . for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville." (*Id.* at ¶ 9(a).)[11]

The Bankruptcy Court also included a "gate-keeping" provision to screen out suits that did not fall within its subject matter jurisdiction. (*Id.* at ¶ 9(c).) The Objecting Claimants challenge the jurisdictional basis for this gate-keeping provision, which requires future asbestos-related direct action claimants against Travelers to establish first before the Bankruptcy Court that their actions are not based on any relationship that Travelers had with Manville and do not vio-

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[11] Continental also argues that the Clarifying Order's definition of "Travelers" exceeded the scope of the Order's jurisdiction by including Travelers Casualty (formerly Aetna Casualty) and former Travelers affiliate Citigroup in addition to Travelers Indemnity. However, Aetna Casualty was explicitly similarly covered by the Insurance Settlement Order. The Clarifying Order properly barred suits against Citigroup as a Travelers affiliate that arise out of Travelers' insurance relationship with Manville; claims against Citigroup unrelated to Manville would not be covered. (Clarifying Order ¶¶ 9(a) and (b).)

late the Bankruptcy Court's bar orders.[12] The Objecting Claimants argue that this exceeds the Bankruptcy Court's jurisdiction by requiring third parties with claims against Travelers unrelated to Mansville to make an application before the Bankruptcy Court before proceeding with their actions in state or federal court.

In response to such arguments, the Bankruptcy Court concluded that its bar orders have been "repeatedly violated by creative plaintiffs," and that its broad discretionary powers in enforcing its orders allowed it to make the initial determination of whether an asbestos suit against Travelers would violate its orders. (COL ¶¶ 39-42,

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[12] The "gate-keeping" provision, found in Paragraph 9 of the Clarifying Order, provides:

> [N]othing in this Order shall enjoin:
>
> (c) the commencement of asbestos-related direct actions against Travelers arising out of any policy of insurance provided by Travelers to a policyholder other than Manville or involving acts or omissions in connection with such policies, provided that, prior to commencing any such action, the plaintiff shall, upon notice to Travelers, (i) make an application to this Court seeking leave to bring such action, upon representations that no allegations will be made nor evidence will be introduced relating to exposure to Manville asbestos, Travelers [sic] defense of Manville or Travelers [sic] knowledge or alleged knowledge concerning the hazards of asbestos directly or indirectly arising out of its insurance relationship with Manville, and (ii) obtain an order from this Court that the proposed direct action is not covered by the Confirmation Order, including the Insurance Settlement Order, the Channeling Injunction and this Order.

2004 WL 1876046, at *35-36.) The Bankruptcy Court relied on cases where parties before a court had previously violated that court's orders, *see Berger v. Heckler*, 771 F.2d 1556 (2d Cir.1985), and cases relating to the scope of equitable relief to remedy a party's unlawful conduct. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). At the July 6, 2004 hearing, the Bankruptcy Court also cited the automatic stay provision in 11 U.S.C. § 362 as the "ultimate gate-keeping statute" as support for the provision requiring a potential plaintiff to seek permission of the bankruptcy court before bringing a suit against Travelers. (July 6, 2004 Hearing Tr., at 179.) None of these arguments establish jurisdiction to act as a gate-keeper of claims against a *non-debtor*—as opposed to a debtor subject to the automatic stay.

While the Bankruptcy Court is authorized under 11 U.S.C. § 105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," this broad statutory authority does not, in itself, provide jurisdiction. *Combustion Engineering*, 391 F.3d at 225. If "creative plaintiffs" violate the Bankruptcy Court's orders in their attempts to plead around the injunction, the Bankruptcy Court has jurisdiction to find them in contempt. But the Bankruptcy Court has no jurisdiction to screen, in the first instance, suits against a non-debtor that purport to assert claims unrelated to the debtor or the estate. Moreover, the equitable powers of a court to enforce its orders against a recalcitrant party provide no basis for the Bankruptcy Court to require unspecified persons

who may not be parties before the that Court to seek its approval before bringing lawsuits that may have no relationship to the Bankruptcy Court's prior orders. Thus, the gate-keeping provision in Paragraph 9(c) must be vacated.

Finally, the appellants challenge the independent jurisdictional basis for the Bankruptcy Court's approval of the settlements of the Direct Action Suits. The parties characterize the settlements as analytically distinct from the Bankruptcy Court's interpretation of the 1986 Orders. Nonetheless, as the Bankruptcy Court found, the Direct Action Suits are violations of the 1986 Orders. The motion by Travelers to enjoin the Direct Action Suits—as well as the possibility of contempt for disregarding the 1986 Orders—created a dispute properly before the Bankruptcy Court, which then referred this dispute to mediation. The settlements are a product of the mediation and represent a resolution of a dispute within the Bankruptcy Court's jurisdiction.

Continental and Chubb argue that, having found that the Direct Action Suits violated the 1986 Orders, the Bankruptcy Court could not thereafter approve the settlement of those actions. They argue that jurisdiction was limited to finding the plaintiffs in those suits in violation of the outstanding orders. However, there was plainly a dispute over the scope of the Bankruptcy Court's 1986 Orders and the resolution of that dispute was within the Bankruptcy Court's jurisdiction. The settlement was only reached after considerable time and effort by a sophisticated mediator. It provided a level of

additional certainty and repose for which Travelers was prepared to pay. The fact that other insurance companies question that choice did not deprive the Bankruptcy Court of jurisdiction. Thus, approving the settlements was a proper exercise of the Bankruptcy Court's jurisdiction.

In conclusion, the Bankruptcy Court has subject matter jurisdiction to enjoin the Direct Action Suits pursuant to the 1986 Orders and the Clarifying Order, but does not have jurisdiction to act as a "gate-keeper" and to review suits that purport not to relate to Travelers' relationship with Manville.

B.

Continental and Chubb argue that even if the Bankruptcy Court had subject matter jurisdiction over the Direct Action Suits, the Clarifying Order still exceeded the Bankruptcy Court's statutory authority under 11 U.S.C. §§ 105(a) and 524(g).

Continental argues that extending the injunction barring suits against Travelers to include claims unrelated to Manville could not be essential to Manville's reorganization, and thus is beyond the statutory authority conferred by § 105(a). This argument ignores the Bankruptcy Court's factual findings detailed above—which are not clearly erroneous—that the Direct Action Suits against Travelers were, in fact, indirect attempts to collect on the insurance policies, and that essentially all the plaintiffs in those suits were exposed to Manville asbestos. Moreover, the Second Circuit Court of Appeals, in upholding the same injunction, noted it was necessary for

the Manville reorganization. *MacArthur*, 837 F.2d at 93 (citing § 105(a) as authority for the injunction, and also noting that § 105 "has been construed liberally to enjoin suits that might impede the reorganization process"); *see also Kane*, 843 F.2d at 643 n. 4.

Chubb argues that the Bankruptcy Court could not expand the original 1986 Orders except by an injunction that satisfied the requirements of 11 U.S.C. § 524(g), and that the Clarifying Order did not comply with § 524(g) because the new settlement funds were not placed in the Manville Trust, which Chubb contends is required by 11 U.S.C. § 524(g)(4)(B)(ii). This argument also fails, because the injunctions in the 1986 Orders predated the enactment of § 524(g) in the Bankruptcy Reform Act of 1994, and thus falls within the "grandfather" provision under 11 U.S.C. § 524(h). Section 524(h) provides that "[f]or purposes of subsection (g) . . . if an injunction of the kind described in [§ 524(g)] was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of [§ 524(g)]" if it meets certain requirements, all of which are applicable here. Thus, the injunctions in the 1986 Orders are within the Bankruptcy Court's statutory authority, and it is *those* Orders which were sufficient to bar the Direct Actions.

C.

Chubb separately argues that even if the 1986 Orders were proper, Chubb is not bound by them. Chubb argues that it did not have proper notice of the 1986 Orders because—despite being a sophisticated insurer—it could not have thought that it would be affected by the Orders at the time because it was not a Manville insurer. Chubb further argues that because it was not adequately represented as a future claimant at the proceedings regarding the 1986 Orders, Chubb is not bound by those Orders and the subsequent Clarifying Order in light of the due process concerns identified in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). *See also Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (2d Cir.2006); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir.2001), *aff'd by an equally divided Court in pertinent part, vacated in part on other grounds*, 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003).

Chubb's argument fails for several reasons. The broad language regarding the proposed Insurance Settlement Order in the nationwide August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation should have put Chubb—a sophisticated insurer with asbestos-related insurance policies—on notice with regards to whatever asbestos-related claims it may have

against Travelers and the other settling insurers.[13] Indeed, the Court of Appeals rejected a similar argument in *MacArthur:* ". . . MacArthur and all other interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court. The notice of proposed settlements issued by the Bankruptcy Court met the requirements of due process." *MacArthur,* 837 F.2d at 94.

Moreover, the Supreme Court recognized that there is an exception to the due process concerns raised by Chubb "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate." *Ortiz,* 527 U.S. at 846, 119 S.Ct. 2295 (internal quotation omitted). Unlike the class action settlements in *Amchem* and *Ortiz,* the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate, including the insurance policies. "A bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether

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[13] The August 2, 1984 Notice provided:

> An order of the Bankruptcy Court shall be obtained providing that all persons shall be restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any person against any and all the Settling Carriers based upon, arising out of or relating to any or all of the insurance policies . . . .

(Docket No. 3684, Ex. G at 5.)

named in the action or not, has to the property or thing in question. The proceeding is "one against the world." ' " *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004) (quoting 16 J. Moore, et al., *Moore's Federal Practice* § 108.70[1], p. 108-106 (3d ed.2004)). Thus, the Bankruptcy Court's power over the estate allows it to bar Chubb's indirect claims against the estate.

D.

OneBeacon—and to some extent also Continental—argue that if the Clarifying Order purports to clarify the 1986 Orders as applying to Travelers, then the Clarifying Order should also apply to them as Manville insurers who settled in 1986 pursuant to the same 1986 Orders. The Clarifying Order itself specifies that it applies only to Travelers. Both OneBeacon and Continental filed their own separate motions before the Bankruptcy Court seeking to enjoin the Direct Action Suits filed against them as barred by the 1986 Orders. Those motions remain pending.

The Bankruptcy Court addressed these pending motions during the July 6, 2004 hearing on Travelers' motion, and found it premature to consider them:

> There are separate motions pending before me for the other carriers to be included, and if and when those motions are actually coming before me without the benefit of having

> been resolved . . . then it is germane at that particular time.

(July 6, 2004 Hearing Tr., at 117.) OneBeacon argues that despite the fact that the Bankruptcy Court has yet to rule on its motion, this issue is ripe for this Court to consider because the Bankruptcy Court's failure to include OneBeacon in the Clarifying Order already affected OneBeacon's contribution and indemnification rights against Travelers. However, there is no Bankruptcy Court ruling for this Court to consider on appeal as to whether the 1986 Orders similarly cover OneBeacon or Continental and thus similarly bar claims against those insurers as well. This issue is not ripe for review until OneBeacon and Continental have a ruling on their separate motions before the Bankruptcy Court.

E.

The Objecting Claimants argue that the Bankruptcy Court made various procedural errors in approving the settlement. In reviewing the Bankruptcy Court's decision to approve a settlement, this Court's review "is restricted to determining whether there was a clear abuse of discretion." *Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y.1994). The Bankruptcy Court "must make an independent determination when approving a settlement," but "should not conduct a 'mini-trial' on the merits." *Id.* at 122.

1.

The Objecting Claimants argue that the Bankruptcy Court failed to conduct a thorough analysis of the reasonableness of the settlement with the Common Law Plaintiffs. In particular, the Objecting Claimants allege that the Bankruptcy Court failed to consider the probability of success in litigation, the interest of the common law plaintiffs as creditors to the estate, and the breadth of the release. The sole evidence provided by the Objecting Claimants of such allegations is the Bankruptcy Court's limitation of questioning and proof in connection with the cross-examination of a single witness. (*See* July 6, 2004 Hearing Tr., at 166.) However, a bankruptcy judge "is not required to assess the minutia of each and every claim," but instead "need only canvass the settlement to determine whether it is within the acceptable range of reasonableness." *Nellis*, 165 B.R. at 123 (citing *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)).

The Objecting Claimants have failed to show a clear abuse of discretion. In light of the fact that the "experience and knowledge of the bankruptcy court judge is of significance in assessing the propriety of the settlement," *Nellis*, 165 B.R. at 123, the Bankruptcy Court's over twenty years experience with the Manville reorganization supports the conclusion that the settlement was fair and equitable. The Bankruptcy Court specifically considered the balance between the likelihood of success compared to the present and future benefits of the settlement, the prospect of complex and protracted litigation if the settlements were not

approved, the competency and experience of counsel, the relative benefits to the settling parties, the nature and extent of the releases, and the extent to which the settlement was the product of arm's length bargaining. The Bankruptcy Court specifically noted that the settlements provided Manville Claimants with a significant new source of asbestos compensation. (COL ¶¶ 52-54; 2004 WL 1876046, at *36-37.) The Bankruptcy Court considered extensive submissions and heard arguments at the July 6, 2004 evidentiary hearing. The Bankruptcy Court properly found that the settlement was fair and equitable.

2.

The Objecting Claimants next challenge as improper the Bankruptcy Court's decision to use the bifurcated approach described in *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145 (2d Cir.1987), in approving the settlement with the Common Law Plaintiffs prior to approving the still-to-be-determined fund distribution procedures. The Objecting Claimants argue that the fairness of a settlement cannot be properly evaluated until the fund distribution procedures are already known. This argument has no merit and is contradicted by considerable precedent. *See Agent Orange*, 818 F.2d at 170 ("To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished."); *Nellis*,

165 B.R. at 126 ("Approval of a settlement can predate the determination of individual awards under the distribution plan."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir.1999); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 149-51 (E.D.N.Y.2000); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y.1998); *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 922 (S.D.N.Y.1991).

3.

The Objecting Claimants argue that they received only eighteen days notice of the proposed settlement, rather than the twenty day notice required by Fed. R. Bankr.P. 2002(a)(3) for a "hearing on approval of a compromise or settlement of a controversy . . . ." By the Objecting Claimants' calculations, because the notice of the hearing on the motion to approve the settlement was mailed on June 7, 2004, and the deadline for objections to be filed was June 28, 2004, only eighteen days notice for objections was given, when factoring in the presumed three days mailing time provided for in Fed. R. Bankr.P. 9006(f).

This objection is specious. Rule 2002(a)(3) requires a twenty day notice for a hearing, not for the deadline for filing objections. Here, more than twenty days notice was given for the hearing, which was on July 6, 2004. Moreover, because the Objecting Claimants did, in fact, receive notice of the hearing, timely filed objections, and participated in the hearing, there was no prejudice demonstrated.

4.

Certain of the Objecting Claimants (specifically, the "Asbestos Personal Injury Plaintiffs") also argue that the Bankruptcy Court failed to conduct the appropriate analysis regarding the reasonableness of the $20 million attorneys' fees awarded to counsel for the Common Law Plaintiffs. (Objecting Claimants Brief at 39-40.) They argue that the Bankruptcy Court did not examine the factors for approving applications for attorneys' fees identified in *Chatelain v. Prudential-Bache Securities, Inc.*, 805 F.Supp. 209, 216 (S.D.N.Y.1992) ("In approving applications for attorneys' fees, courts in this circuit examine the following factors: (1) time and labor expended by counsel; (2) magnitude and complexity of the litigation; (3) risk of the litigation; (4) quality of representation; (5) requested fee in relation to the settlement; and (6) public policy considerations.")

Courts in this circuit also calculate attorneys' fees as a percentage of the recovery, and have granted awards of 15% to 50% of the settlement. *Id.* at 215. In this case, Travelers paid the $20 million attorneys' fee in addition to the $70 million settlement with the Common Law Plaintiffs, meaning that the attorneys' fees were approximately 22% of the total $90 million recovery, in line with other acceptable percentages identified in *Chatelain*. *Id.* at 215-16 (noting that courts have approved attorneys' fees amounting to 25%, 27%, and 28% of recovery).

Moreover, the Clarifying Order specifically found that the attorneys fees of the Common Law

Plaintiffs' counsel were "fair, equitable and reasonable in light of the complexity of the litigations and the size of the recoveries for the . . . Common Law Direct Action Plaintiffs . . . ." (Clarifying Order at 4.) Given the Bankruptcy Court's familiarity with the claims in the case and their history and complexity, as well as the significant benefits obtained by the counsel for the Common Law Plaintiffs, there was ample basis for approving the fee. There is no showing that there was a clear abuse of discretion in approving the $20 million attorneys' fee.

5.

The Objecting Claimants conclude with a perfunctory argument that the Bankruptcy Court erred in denying their motion to amend findings or for a new trial pursuant to Fed.R.Civ.P. 59. Because, as explained above, the Objecting Claimants have failed to demonstrate that the Bankruptcy Court made a manifest error or caused a manifest injustice, the Bankruptcy Court correctly denied the motion.

F.

Finally, the Court considers the merits of the appellants' objections to the judgment reduction provision discussed above with respect to the motion to dismiss.

The Objecting Insurers argue that the judgment reduction provision is unenforceable because the Bankruptcy Court lacked jurisdiction to enter the Clarifying Order. For the reasons

discussed above, the Bankruptcy Court had such jurisdiction.

The Objecting Insurers also argue that the judgment reduction provision is unfair to them for various reasons. The Objecting Insurers argue that at least three states in which Direct Action Suits are pending (West Virginia, Ohio, and Massachusetts) permit only *pro tanto* judgment reduction (i.e., the amount plaintiffs recovered from the settlement fund), meaning that Objecting Insurers could potentially receive zero judgment reduction in some cases if the settlement funds were exhausted. The Objecting Insurers further argue that future claimants could challenge the enforceability of the judgment reduction provision on due process grounds. The Objecting Insurers also protest that they would be burdened by being forced to seek enforcement of the judgment reduction provision in the Bankruptcy Court. OneBeacon additionally argues that the bar order prevents it from taking discovery from Travelers to defend itself in Direct Actions Suits and to enforce the judgment reduction provision. However, OneBeacon and the other Objecting Insurers would be able to seek discovery from Travelers as a third party by normal third party discovery rules.

The Bankruptcy Court's determination that the judgment reduction provision adequately protected the non-settling insurance companies cannot be said to be a clear abuse of discretion, especially where the Bankruptcy Court found that the 1986 Orders already barred contribution and indemnification claims even before the settlement. (COL ¶ 35; 2004 WL 1876046, at *34.)

The bar order in the Confirmation Order has been upheld as valid. *MacArthur*, 837 F.2d at 93; *Kane*, 843 F.2d at 643 n. 4. Moreover, other courts have upheld settlements that seek to ameliorate the harm from bar orders by imposing similar judgment reduction provisions. *See Gerber*, 329 F.3d at 302-06; *Eichenholtz*, 52 F.3d at 487; *In re WorldCom, Inc. Securities Litig.*, No. 02 Civ. 3288, 2005 WL 591189, at *8-9 (S.D.N.Y. March 14, 2005); *WorldCom*, 339 F.Supp.2d at 568.

Finally, with respect to the argument that future claimants would be able to assert due process challenge claims against the enforcement of the judgment reduction provision, the Second Circuit Court of Appeals has already rejected such a challenge. In an unpublished opinion, the Court of Appeals reviewed the record of the Manville bankruptcy and noted that future claimants were adequately represented with regards to the confirmation of the Manville Plan:

> We reject O'Malley's challenge to the performance of the Legal Representative of future claimants substantially for the reason stated by the Trial Courts in their Amended Memorandum, Orders and Final Judgment dated January 19, 1995, reported at 878 F.Supp. 473. *See, e.g., id.* at 565 (Legal Representative "took an active and aggressive role in protecting future claimants" in this litigation).

Joint Eastern and Southern Dist. Asbestos Litig., 1996 WL 77954, at *1.

The appellants have failed to show that the Bankruptcy Court abused its discretion in determining that the settlement, including the judgment reduction provision, was fair and reasonable.

CONCLUSION

The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss are denied. With respect to the merits of the various appeals, the Bankruptcy Court's Findings and Clarifying Order are affirmed, except for the portions relating to the "gate-keeping" provision. Thus, paragraph 9(c) of the Clarifying Order is vacated.

SO ORDERED.

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In proceedings for a Reorganization
Under Chapter 11.
Case Nos. 82 B 11656, 82 B 11657,
82 B 11660, 82 B 11661, 82 B 11665
through 82 B 11673 inclusive,
82 B 11675, 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION and MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS, INC.,

Debtors.

ORDER APPROVING SETTLEMENT OF THE STATUTORY, HAWAII AND COMMON LAW DIRECT ACTIONS AND CLARIFYING CONFIRMATION ORDER, INCLUDING INSURANCE SETTLEMENT ORDER AND CHANNELING INJUNCTION

WHEREAS, on June 19, 2002 The Travelers Indemnity Company, Travelers Casualty and Surety Company (formerly The Aetna Casualty and Surety Company) and certain affiliates (collectively, "Travelers" as defined below), brought a motion for an Order To Show Cause enjoining plaintiffs from prosecuting certain lawsuits as against Travelers on the grounds that those lawsuits are barred by this Court's prior orders entered in connection with confirmation of the Second Amended and Restated Plan of Reorganization ("Plan") of Johns-Manville Corporation and its affiliates ("Manville");

WHEREAS, Travelers is defined as follows: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries and sister companies (i.e., entities that are directly or indirectly owned or controlled by a common parent or holding company), as well as each of their respective predecessors, successors, assigns, officers and directors. (All of the foregoing collectively referred to as "Travelers Entities"). Travelers shall also include future parents, subsidiaries and sister companies of the Travelers Entities (or succes-

sors of any of the foregoing), provided, however, that nothing in this definition shall be construed to include The St. Paul Companies or any other company first acquiring, acquired by or merging with any of the Travelers Entities on or after November 19, 2003 for liability for such Entity's own conduct and not for conduct relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities. Travelers shall also include past parents, subsidiaries or sister companies of any of the Travelers Entities (or successors of any of the foregoing), provided however that nothing in this definition shall be construed to include any such past parent, subsidiary or sister company that no longer is a parent, subsidiary or sister company of any of the Travelers Entities as of November 19, 2003 for its own conduct after its ownership of or by or affiliation with any of the Travelers Entities ended and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities. By way of example, Travelers shall not include Aetna Inc., or any of its predecessors in interest, for their own conduct post-dating April 1996 relating to or arising from acts, omissions, conduct or issuance of insurance and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities.

WHEREAS, on December 22, 1986 the Court entered the Confirmation Order, which became final on October 28, 1988 ("Confirmation Order");

WHEREAS, the Confirmation Order contained within it the Insurance Settlement Order previ-

ously entered by this Court and the Channeling Injunction;

WHEREAS, the Confirmation Order found that the Insurance Settlement Order and Channeling Injunctions were essential components of the confirmation of the Manville Plan;

WHEREAS, as stated in the Manville Personal Injury Settlement Trust Agreement (the "Manville Trust"), a vital purpose of the Manville Trust was "to deliver fair, adequate and equitable compensation to bona fide Beneficiaries, whether presently known or unknown . . . with settlement to be preferred over arbitration . . . and over . . . resort to the tort system.";

WHEREAS, another vital, related purpose of the Manville Trust was to enhance and preserve the Manville Trust estate;

WHEREAS, the Confirmation Order adopted these purposes, in part by enjoining the bringing of claims against insurers that arise out of, are based upon or related to settled policies and thereby providing finality to insurers;

WHEREAS, this Court is hereby interpreting and enforcing the Confirmation Order, and the Insurance Settlement Order and Channeling Injunction contained therein, and this Court has jurisdiction to enter this Order under 28 U.S.C. Sections 1334(b), 157(b)(2)(L); 11 U.S.C. Sections 105(a), 1141(a), 1142(b); and *In re Petrie Retail, Inc.*, 304 F.3d 223 (2d Cir. 2002) ("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders."); *In re U.S. Brass Corp.*, 301 F.3d 296, 308 (5th Cir. 2002); *In*

re Texaco, Inc., 182 B.R. 937, 944 (S.D.N.Y. 1995); *In re Johns-Manville Corp.*, 97 B.R. 174, 179-80 (Bankr. S.D.N.Y. 1989);

WHEREAS the Statutory Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Statutory Direct Actions;

WHEREAS after giving notice to holders of Statutory Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Statutory Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS the Hawaii Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Hawaii Direct Action Claims;

WHEREAS after giving notice to holders of Hawaii Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Hawaii Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS the Common Law Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Common Law Direct Actions;

WHEREAS after giving notice to holders of Common Law Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Common Law Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS, based upon this Court's familiarity with the Manville bankruptcy case since its inception in 1982, the Court's entry of the Insurance Settlement Order, the confirmation proceedings before this Court and the entry of the Confirmation Order, and the evidentiary hearing referenced above,

THE COURT HEREBY FINDS AND CONCLUDES:[1]

(a) The Statutory, Hawaii and Common Law Direct Action Settlement Agreements, as amended, are fair adequate, equitable and reasonable as to the Statutory, Hawaii and Common Law Direct Action Plaintiffs respectively;

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[1] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Bankruptcy Rule 7052.

(b) Notice of the Statutory, Hawaii and Common Law Direct Action Motions was good, sufficient and effective;

(c) The Statutory, Hawaii and Common Law Direct Action Settlement Funds are each independent entities separate and apart from the Manville Trust;

(d) The attorneys' fees to the Statutory, Hawaii and Common Law Direct Action Plaintiffs' Counsel are fair, equitable and reasonable in light of the complexity of the litigations and the size of the recoveries for the Statutory, Hawaii and Common Law Direct Action Plaintiffs respectively;

(e) The selection of the Claims Resolution Management Corporation as administrator of the Statutory Direct Action Settlement Fund and the Hawaii Direct Settlement Fund is appropriate; and

(f) The selection of Special Claims Services, Inc. as administrator of the Common Law Direct Action Settlement Fund is appropriate.

AND THE COURT HEREBY ORDERS:

1. The following pending statutory lawsuits: (i) the lawsuits consolidated under *In Re Asbestos - Unfair Trade Practices Insurance Cases*, No. 02-C-7000, Circuit Court of Kanawha County, West Virginia; and (ii) *Agnes Cashman, et al. v. Travelers Indemnity Company*, et al., Civ. A. No. 02-2056, Superior Court of Suffolk County,

Commonwealth of Massachusetts, to the extent they are asserted against Travelers, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

2. The *Baclaan, Toro,* and *Hopkins* complaints each specifically allege that Travelers conspired to provide false interrogatory responses concealing the fact that Combustion Engineering sold Johns-Manville asbestos products in Hawaii. *See* Complaint, *Baclaan,* at ¶¶ 28-29, 38; Complaint, *Toro,* at ¶¶ 28-29, 38; Complaint, *Hopkins,* at ¶¶ 28-29, 38. Combustion Engineering sold goods containing Manville asbestos and Manville asbestos-containing products in the United States.

3. The vast majority of Hawaii asbestos claimants, including the plaintiffs in the *Baclaan, Toro,* and *Hopkins* actions, have filed claims against the Manville Trust, and the overwhelming majority of Hawaii asbestos claimants, including the plaintiffs in the *Baclaan, Toro,* and *Hopkins* actions, were exposed to Manville asbestos.

4. The following pending lawsuits: (i) the putative class action lawsuits captioned *Lorenzo Baclaan, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-00325 United States District Court for the District of Hawaii, and *George Toro, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-00326, United States District Court for the District of Hawaii, and (ii) the lawsuit captioned *Theodore K. Hopkins, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-

00401, United States District Court for the District of Hawaii, to the extent they are asserted against Travelers, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

5. The pending common law lawsuits identified in Exhibit A hereto, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

6. The commencement or prosecution of all claims, demands, actions or proceedings against Travelers of any kind or nature whatsoever under the statutes, laws or regulations of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina or West Virginia arising from or relating to any acts or omissions of Travelers in (a) the handling, defense, trial, appeal or settlement or participation in the handling, defense, trial, appeal or settlement of any asbestos-related bodily injury claim, (b) disclosing, failing to disclose, suppressing, misleading, conspiring with any entity to disclose or fail to disclose, suppress or mislead or acting in concert with any entity to disclose or fail to disclose or suppress or mislead any facts, information, knowledge or beliefs about asbestos or its hazardous properties in connection with the han-

dling, defense, settlement or trial or participation in the handling, defense, settlement or trial of any asbestos-related bodily injury claim, or (c) asbestos-related claims that allege unfair competition, unfair or deceptive claims handling or trade practices, lack of good faith and fair dealing, statutory-based claims for "bad faith", actual or constructive fraud, actual or constructive breach of fiduciary duty involving, in any way, asbestos; and any claims for contribution or indemnity relating in any way to the foregoing (a) through (c), are covered by the Confirmation Order and permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

7. The commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

8. All actions against Travelers by past, present or future claimants who have asserted or may in the future assert claims against the Trust and who have executed releases releasing all rights and claims of any kind against Travelers whether based in tort, contract, fraud or any other legal or equitable theory and all rights or claims of any kind against Travelers allegedly resulting from exposure to asbestos and/or asbestos containing products that were manufactured, distributed or sold by Manville or any of the debtors are permanently enjoined as against Travelers pursuant to the Confirmation Order and the releases executed by such claimants.

9. Subject to Decretal Paragraph 10 below, nothing in this Order shall enjoin:

(a) the commencement and prosecution of claims against Travelers by policyholders other than Manville (or assignees of such policyholders) for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville;

(b) claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers alleged liability or the proof required to establish Travelers alleged liability is unrelated to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers insurance relationship with Manville; and

(c) the commencement of asbestos-related direct actions against Travelers arising out of any policy of insurance provided by Travelers to a policyholder other than Manville or involving acts or omissions in connection with such policies, provided that, prior to commencing any such action, the plaintiff shall, upon notice to Travelers, (i) make an application to this Court seeking leave to bring such action, upon representations that no allegations will be made nor evidence will be introduced relating to exposure to Manville asbestos, Travelers defense of Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos directly or indirectly arising out of its insurance relationship with Manville, and (ii) obtain an order from this Court that the proposed direct action is not covered by the Confirmation Order, including the Insurance Settlement Order, the Channeling Injunction and this Order.

10. This Order is an order clarifying the Confirmation Order and, as provided in Paragraph 28 of the Confirmation Order, this Court retains jurisdiction to enforce this Order and to determine any and all disputes arising under this Order. All persons and entities are hereby permanently enjoined from commencing any action or proceeding as to the scope or meaning of the Confirmation Order, including the Insurance Settlement Order, Channeling Injunction and this Clarifying Order, except in this Court.

11. Nothing in this Order shall increase the liability of or assign new liabilities to the Manville Trust. The parties to the proposed settlements before the Court have agreed to the creation of three new funds. Consistent with the overall purposes of the Manville Trust and the Confirmation Order to further provide compensation to bona fide claimants and to further enhance and protect the Manville Trust:

(a) All claims, demands, actions or proceedings described in paragraphs 1 and 6 above shall be transferred, and shall attach, solely to the Statutory Direct Action Settlement Fund and shall be subject to the court-approved Statutory Direct Action Settlement Fund fund distribution procedures.

(b) All claims, demands, actions or proceedings described in paragraphs 2, 3 and 4 above shall be transferred, and shall attach, solely to the Hawaii Direct Action Settlement Fund and shall be subject to the court-approved Hawaii Direct Action Settlement Fund fund distribution procedures.

(c) All claims, demands, actions or proceedings described in paragraphs 5 and 7 shall be transferred, and shall attach, solely to the Common Law Direct Action Settlement Fund and shall be subject to the court-approved Common Law Direct Action Settlement Fund fund distribution procedures.

12. This Order and the findings contained herein are based and dependent upon the prior record in this case and the submissions and evidence presented at the evidentiary hearing conducted on July 6, 2004.

13. Other than as respects Travelers, this Order shall not be dispositive of any other motions or proceedings, or any objections to such motions or proceedings that have or may be filed.

14. Any judgment obtained against Century Indemnity Company ("Century") and/or any objecting insurer (or any of Century's or such other insurer's affiliates, related or allegedly related entities, or any defendant sued as its alleged predecessor or successor) (an "Insurer"), regardless of whether such Insurer was a settling Manville insurer, with respect to any claim asserted in any lawsuit that is enjoined as to Travelers and not enjoined as to said Insurer shall be reduced by the greater of: (a) the amount (if any) the Claimant has recovered or is entitled to recover from the Statutory Direct Action Settlement Fund and/or the Hawaii Direct Action Settlement Fund and/or the Common Law Direct Action Settlement Fund to the extent that the Insurer is entitled to such a reduction for that amount under the applicable state law; or (b) to the extent permitted under the applicable state law, the amount or percentage (up to 100%) that the Insurer would have been able to recover from Travelers, whether by contribution, indemnity or otherwise under applicable state law, had Travelers been joined in said lawsuit and/or sued for indemnity and/or contribution in a separate law-

suit. The Insurer shall, at the earliest practicable time, assert its claim for judgment reduction in the court in which judgment is sought against the insurer. If such court declines to adjudicate the judgment reduction claim, the Insurer shall promptly assert its judgment reduction claim in this Court, and this Court will adjudicate the amount or percentage of such judgment reduction. In the event such a judgment reduction proceeding is litigated in this Court, the parties shall not seek to enforce the underlying judgment until such judgment reduction proceeding is concluded.

Dated: New York, New York
August 17, 2004 at
4:50 o'clock p.m.

SO ORDERED:

/s/ Burton R. Lifland
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 82 B 11656, 82 B 11657, 82 B 11660,
82 B 11661, 82 B 11665, 82 B 11673,
82 B 11675, 82 B 11676(BRL)

August 17, 2004

IN RE JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS, INC.,

Debtors.

Elihu Inselbuch, Caplin & Drysdale, Chartered, New York, NY, for Debtors.

David T. Austern, Manville Personal Injury Settlement, Trust, Fairfax, VA, for Trustee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRAVELERS MOTIONS FOR APPROVAL OF CERTAIN SETTLEMENT AGREEMENTS AND FOR ENTRY OF A CLARIFYING ORDER

LIFLAND, Bankruptcy J.

WHEREAS, on June 19, 2002, The Travelers Indemnity Company, Travelers Casualty and Surety Company, and certain affiliates (as further defined in the Proposed Order) filed a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"); and

WHEREAS, the Motion and accompanying affidavit and exhibits recounted the filing of numerous "direct action" lawsuits seeking to hold Travelers[1] liable for alleged asbestos-related personal injuries arising from (1) Travelers underwriting of insurance policies for the Debtors herein, Johns-Manville Corporation and affiliated entities (collectively, "Johns-Manville" or "Manville"); (2) Travelers investigation, defense and settlement of claims against Manville; and (3) the knowledge Travelers gained in the course of its nearly three-decades-long insurance relationship with Manville (collectively, the "Direct Action Claims"); and

[1] "Travelers" as used herein is as defined at page 2 of the Proposed Order and in the Settlement Agreements.

WHEREAS, the Motion contended that the assertion of Direct Action Claims violated this Court's permanent injunction prohibiting "all Persons" from "commencing and/or continuing any suit, arbitration or other proceeding of any type or nature" against Travelers that seeks to collect "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Travelers] based upon, arising out of or relating to" the insurance policies Travelers issued to Manville;[2] and

WHEREAS, the Court duly considered the Motion and the attached affidavit and exhibits, and on the same date issued a temporary restraining order prohibiting further prosecution as against Travelers of certain enumerated lawsuits advancing Direct Action Claims, which order was subsequently extended to other lawsuits advancing Direct Action Claims, and has been extended in duration from time to time and is still in effect; and

WHEREAS, on August 1, 2002, after a hearing of which the pertinent parties were given notice and an opportunity to be heard, and at which the Court accepted Travelers evidence, including the expert affidavit of Professor George Priest of The Yale Law School (who was present in court and available for cross-examination), the Court referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor

[2] *See* ¶ 61, *infra*.

of the State of New York, as mediator (the "Mediator"); and

WHEREAS, subsequent months of negotiations between Travelers and plaintiffs prosecuting the Direct Action Claims culminated in the execution of settlement agreements which (1) if approved by this Court, will fully and finally resolve all of the Direct Action Claims and establish compensation funds totaling $440 million; and (2) are conditioned upon the Court's entry of an Order clarifying that Direct Action Claims were enjoined under the Court's Confirmation Order and the Insurance Settlement Order incorporated there; and

WHEREAS, Travelers and the plaintiffs prosecuting Direct Action Claims filed motions seeking approval of these settlement agreements and entry of the clarifying order, which motions were the subject of broad notice to potentially affected parties (as set forth further herein), extensive briefing, argument, and an evidentiary hearing held July 6, 2004;

NOW, THEREFORE, upon due consideration of the forgoing and the record in these proceedings, including, without limitation, the Manville Second Amended and Restated Plan of Reorganization ("Manville Plan"); the order dated December 18, 1986, approving certain insurance settlement agreements (the "Insurance Settlement Order"); the order dated December 22, 1986, confirming the Manville Plan ("Confirmation Order"); the evidence adduced at the July 6, 2004, hearing and in the parties' prior extensive submissions to the Court; oral argument heard on, *inter alia*,

August 1, 2002 and July 6, 2004; and the recommendation of the Mediator, and keeping in mind that a court should not blindly accept findings of fact and conclusions of law proffered by the parties, *see St. Clare's Hospital and Health Center v. Insurance Company of North America (In re St. Clare's Hospital and Health Center)*, 934 F.2d 15 (2d Cir.1991) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964)), and having conducted an independent analysis of the law and the facts, the Court makes the following Findings of Fact and Conclusions of Law.[3]

FINDINGS OF FACT

I. JOHNS-MANVILLE, ASBESTOS AND TRAVELERS

A. The Universe of Asbestos Claimants Are Manville-Related

1. Fundamentally, the story of asbestos health litigation is the story of Johns-Manville. Manville was intimately involved with the mining, manufacture and distribution of asbestos from its inception:

> According to most sources, from the 1920's until the 1970's Johns-Manville was both the largest manufacturer of asbestos-containing products and the largest supplier of [raw] asbestos in the United States. . . . The company boasted in an article in *Asbestos Mag-*

[3] Findings of fact shall be construed as conclusions of law and *vice versa* as appropriate.

> *azine* in 1970, that "Johns-Manville participates in almost every facet of the Asbestos Industry and is the largest producer of asbestos-based products in the United States."

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 742 (E.D.N.Y. & Bankr.S.D.N.Y.1991) (Weinstein, J. & Lifland, J.), *vacated on other grounds*, 982 F.2d 721 (2d Cir.1992), *modified on reh'g*, 993 F.2d 7 (2d Cir.1993).

2. Henry Ward Johns had obtained a patent for an asbestos insulation product in 1868 and developed his business from asbestos deposits discovered on Staten Island in 1874. *See* W. Richard Goodwin, The Johns-Manville Story, Address delivered at the National Meeting of the Newcomen Society (Dec. 16, 1971) at 7. The Manville Covering Company, organized by Charles B. Manville in 1886, sold asbestos products of the H.W. Johns Company in the Midwest. The two companies merged in 1901 to become the H.W. Johns-Manville Company. By 1925, the company's sales had increased to nearly $40 million per year, and Manville asbestos was used to roof many houses and insulate pipes after World War I. *See id.* at 8; *see also* Dunbar Decl., Tab A (Ex. 22), Expert Report of Frederick C. Dunbar ("Dunbar Report") at 1-2.

3. By 1970, Manville was reportedly the world's largest producer of raw asbestos operating with mines in Quebec, California, Newfoundland and Ontario, including one in Asbestos, Quebec touted as "the largest in the free world." Manville shipped its raw asbestos to other manufacturers

of asbestos-based products in 58 countries. *See* Goodwin, Manville Story at 11-12. Indeed, Manville was *the* prime supplier of asbestos fiber products and distributed its products across the entire spectrum of industries and employment categories subject to asbestos exposure. In fact, there are no industries from which claimants originate where Manville did not provide asbestos products—either manufactured or raw materials. Thus, the range of products containing Manville asbestos is extremely broad and practically immeasurable.

4. Manville produced a wide array of asbestos-containing products for industrial uses, including pumps, gaskets, asbestos textiles, brake linings, brake shoes for the Metroliner trains, cements and insulations for heating systems, insulations for aircraft and aerospace industries, asbestos cement and insulated pipes, and construction materials such as acoustic ceiling panels. *Id.* at 12-13. Moreover, Manville manufactured its products for very long periods of time, often through the whole twentieth century up until it stopped making asbestos products in the mid-1970's.

5. As the Court has previously observed:

> During its heyday, Manville marketed more than 500 different lines of products manufactured at the company's 33 plants and mines located throughout the United States and Canada. . . . In its Product Handbook, Manville projected that its asbestos mill in Quebec, built in the mid-1950's would have "full production capacity . . . greater than

> one-third the free world's supply of asbestos fibre," and that the mine was "the largest mine in the world for the production of asbestos fibre." Similarly, Manville proudly announced that it was a "leader in [the asbestos floor tile] industry since it was started on a wide commercial basis."
>
> Products of Johns-Manville saw widespread commercial, industrial and consumer use. In particular, its "85 percent magnesium" products were used extensively in shipyards in the years leading up to and during World War II. Johns-Manville was allegedly one of the few manufacturers that utilized crocidolite-type asbestos fibre in any significant quantity especially after 1945. . . . Significant medical data suggests, as already noted, that crocidolite fibers present greater dangers than other forms of asbestos, particularly in connection with the deadly asbestos-induced cancer, mesothelioma.

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 743.

6. The Court received testimony from David Austern, who, in addition to serving as the President of the Claims Resolution Management Corporation, has been the General Counsel of the Manville Personal Injury Trust ("Manville Trust") for 17 years and has represented the Manville Trust in a variety of litigations. Austern Decl. [Ex. 27] ¶¶ 1-3. A recognized expert on the subject of Manville, the operation of the Manville Trust and asbestos litigation, Mr. Austern has repeatedly testified about asbestos-related issues before

various courts and Congressional committees and has lectured at 21 symposia or seminars on the subject of asbestos claims. *Id.* ¶ 3.

7. In this proceeding, Mr. Austern testified, among other things, that Manville was the largest producer of asbestos in the United States:

> In addition to mining asbestos and manufacturing asbestos containing products, Manville sold asbestos fiber to virtually every other manufacturer of asbestos products. At times, and for some industries, Manville supplied between 50 and 80% of the raw asbestos fiber used by asbestos product manufacturers in the United States.
>
> * * *
>
> From blankets to brakes, floor tiles to roofing shingles, and insulation for homes, autos and ships alike, Manville made asbestos containing products in nearly every category for nearly every use for which asbestos products were deemed advantageous.

Id. ¶¶ 4-5.

8. Mr. Austern further testified that the Claims Resolution Management Corporation ("CRMC") maintains a document resource center containing nearly 4.2 linear miles of Manville documents relating to asbestos, many of them sales records, which show "Manville sold asbestos and/or asbestos-containing products in all 50 states and 21 foreign countries. Manville had well over 50% of the U.S. market, and in some areas 75 to 80% of the market." *Id.* ¶ 6.

9. Mr. Austern testified that the Manville Trust maintains "the largest and most comprehensive asbestos claims database, encompassing over 260 fields of detailed information regarding more than 740,000 asbestos claims." *Id.* ¶ 11. The Trust's database tracks "litigation each [Manville] claimant has filed against any other asbestos defendant, including the jurisdictions in which such litigation was filed," and a comparison of the Trust's database with similar databases of Owens Corning, Combustion Engineering, MacArthur Corporation, Babcock & Wilcox, Certain Underwriters at Lloyds, Fbreboard and an unidentified client of Milliman U.S.A. revealed a "degree of overlap [that] is nearly complete." *Id.* ¶¶ 11-13.Based on these facts and others detailed in his testimony and garnered in his many years of experience, Mr. Austern concluded:

> *In essence, the class of current and potential future asbestos plaintiffs is the same population as the class of current and potential future claimants against the [Manville] Trust.*Trust data has been used by several actuarial firms and other consultants as a basis for predicting the total anticipated number of future asbestos claimants in this country. Claims against the Trust are an established proxy for the universe of all asbestos claims against all defendants.

Id. ¶ 17. (emphasis added).

10. The Court also credits the expert testimony of Dr. Frederick C. Dunbar, an experienced economist who specializes in the evaluation and assessment of liabilities associated with products

that are the focus of mass tort litigation. Dunbar Decl. ¶ 5. Dr. Dunbar—a recognized leader in his field—testified that "Manville was the largest producer of asbestos-containing products and its product line was large and widely diversified. . . . Manville not only produced asbestos-containing products, it also supplied raw asbestos to other producers (its competitors)." *Id.* ¶¶ 10-11. Manville's products were dispersed across the entire spectrum of industries and employment categories subject to asbestos exposure. *Id.* ¶ 12. Based on sound, established and scientifically valid methodology, Dr. Dunbar provided testimony to the effect that, in essence, "Manville asbestos claimants represent the universe of asbestos claimants." *Id.* ¶ 13.

11. This unrebutted-indeed, undisputed[4] evidence of the breadth and length of Manville's asbestos involvement compels the conclusion, as a factual matter, that essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos through Manville's pervasive asbestos mining, processing and manufacturing activities.

B. Travelers Thirty Year Involvement With Manville

12. "Travelers Insurance Company was the primary insurer for Johns-Manville Corporation for

[4] Despite having two years to conduct discovery and ample time to adduce any evidence to the contrary, not a single objector at the hearing rose to cross-examine Dr. Dunbar or Mr. Austern when given the opportunity.

each year from 1947 through 1976." *In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr. S.D.N.Y.1983); *accord* Munroe Decl. ¶ 5. In addition to providing 29 years of primary comprehensive general liability coverage, Travelers issued over 425 other policies to Manville, including but not limited to workers compensation policies, boiler and machinery policies, employers' liability policies, manufacturers and contractors liability policies, owners and contractors protective liability policies, owners, and landlords and tenants general liability policies. *See* Affidavit of Barry Ostrager, dated June 18, 2002 ("Ostrager Aff.") Ex. A at Ex. A-1. Each of those policies was made a part of the Insurance Settlement Agreement. *Id.*

13. Travelers first Manville policy was issued in 1947—well before asbestos became a household word. The Travelers/Manville relationship continued uninterrupted throughout the 1950s (when asbestos lawyers claim that certain workers compensation claims should have put the asbestos industry on notice of the mineral's health hazards), the 1960s (when Dr. Selikoff released his groundbreaking study on the cancer risks for asbestos insulators), and the 1970s (when the intermittent trickle of asbestos litigation became a rushing tide as a result of *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir.1974), and *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir.1975)). *See, e.g.*, Munroe Decl. ¶¶ 24-27 (discussing the Selikoff study and the reaction it caused at Manville and-by extension-Travelers); Parnell Decl. ¶ 8 (same, as to the *Borel* decision).

i. Travelers Learned About The Risks Of Asbestos From Manville

14. In the course of any insurance relationship, an insurer attempts to learn about the risks that it is insuring and derives knowledge from both the claims and underwriting functions. At the underwriting stage, the insurer relies on the insured to provide information about the insured's business, products, claims history and other information relevant to the insured's risk, so that an appropriate premium and the terms and conditions of coverage can be agreed upon. Priest Decl. ¶ 11.

15. Here, Travelers and Manville would have reevaluated their relationship every year for 29 years as a part of the process of assessing and underwriting the risk. Travelers would have learned about Manville's business so it could quantify the risks and make educated judgments about whether to underwrite, and if so at what cost. Priest Decl. ¶ 21.

16. Examples of the type of information Travelers received in connection with its underwriting the Manville policies is memorialized in Travelers contemporaneous documents presented at the hearing:

> An evaluation prepared by Travelers for purposes of underwriting Manville's 1973 insurance program, which assessed the risks presented by Manville's operations in Long Beach, California—including the degree to which employees were exposed to asbestos. Munroe Decl. Tab E (Ex. 57).

A number of "Industrial Hygiene Survey Reports" demonstrating the types of inspections Travelers performed of Manville's Pittsburg Plant, including a discussion of the presence of asbestos at the plant and the fact that respirators were not in use. Munroe Decl. Tab F (Exs.32-36).

A 1969 memorandum authored by a Travelers Engineering Supervisor warning of a "serious loss potential involving the asbestos industry, relative to the workman's and general public exposure to asbestos dust," which was "first brought to [Travelers] attention in December, 1966 by . . . Manville." Munroe Decl. Tab I (Ex. 51).

17. After the underwriting of the insurance policies, under established insurance law and practice, a wide array of conduct flows from the insurance policies, particularly primary comprehensive liability policies like those issued by Travelers to Manville beginning in the 1940s. This is because of the language of the policy, which imposes in the event of a covered loss a duty to defend the policyholder (Manville), as well as established insurance law, which provides further duties, such as the duty of confidentiality and duty of good faith and fair dealing recognized by most jurisdictions. Priest Decl. ¶ 47.

18. In connection with services provided to Manville relating to the Policies, as early as 1947 and late as the 1970s, Travelers, in its role as Manville's insurer, assisted Manville in identi-

fying asbestos dust hazards and establishing dust control programs. Travelers proffered numerous exhibits at the July 6 hearing illustrating such activities, including Industrial Hygiene Survey Reports, memoranda concerning Travelers involvement in the collection of dust samples and other documents relating to surveys and inspections performed by Travelers in accordance with the policies. *See* Munroe Decl. ¶¶ 21-22 & *id.*Tabs F & E (Exs.32-36, 57).

19. Travelers agreed to and did inspect certain Manville plants, test the levels of asbestos dust at Manville facilities, and evaluate workers' asbestos exposure, pursuant to its underwriting activities and because it retained the right to inspect Manville's facilities under the policies. Munroe Decl. ¶ 20.

20. During the 1960s and 1970s, Manville and Travelers generated correspondence and memoranda relating to asbestos, particularly after the publicity that arose as a result of the watershed paper presented by Dr. Irving Selikoff regarding the health effects of asbestos. Munroe Decl. ¶¶ 23-25. Travelers and Manville had meetings to discuss these developments. *Id.* Tabs N & L (Exs.43, 44, 46).

ii. Travelers Defense Of Manville Was A Key Source Of Asbestos Information

21. Manville represented the earliest and largest number of asbestos claims filed against any of Travelers policyholders. As set forth below, as Manville's primary insurer, Travelers

paid for the defense of Manville in asbestos litigation, received reports about the litigations and the evidence elicited therein, and consulted with Manville regarding the defense of cases. Throughout, Manville defended the asbestos cases in the context of joint defense agreements with other defendants, which provided for confidentiality and privilege in accordance with prevailing law. A great deal of information was exchanged among these defense groups and their insurers and between Manville and Travelers.

22. Albert Parnell, one of Manville's lead defense counsel paid by Travelers to defend Manville from the mid-1970s through the time of Manville's bankruptcy filing in 1982, gave persuasive and unrebutted testimony regarding the history of asbestos litigation—which is in large part the history of litigation against Manville —as well as the close relationship that necessarily developed between Travelers and Manville in the course of their insurance relationship. Parnell Decl. ¶¶ 4-6. Mr. Parnell is a particularly significant witness because of his contact with all of the principal Travelers managers and the concomitantly broad basis upon which his knowledge of Travelers knowledge rests. *See id.* ¶ 27.

23. Mr. Parnell provided a thorough account of the history of asbestos litigation, in particular the genesis of the litigation against Manville:

> The explosion of asbestos litigation against Johns-Manville began following the Fifth Circuit's *Borel* decision, which for the first time applied strict liability to asbestos producers. Prior to that decision, asbestos liti-

> gation was largely limited to individual workers compensation claims. *Borel* opened the door to the filing of large numbers of actions by third-party plaintiffs injured by exposure to asbestos. Manville, as a defendant in the *Borel* case, was indemnified and defended by Travelers.

Id. ¶ 8.

24. After *Borel,* Manville was named as a defendant in virtually every asbestos-related personal injury or wrongful death action filed in the United States. *Id.* ¶ 9. Manville was the primary target of asbestos plaintiffs because of Manville's ubiquity in the asbestos context, having manufactured hundreds of products over many years and having been the leading supplier of asbestos. *Id.* ¶¶ 11. Moreover, Manville's trademark and unique packaging was readily identifiable to plaintiffs and their attorneys. *Id.* ¶ 11.

25. Manville was also the primary target of asbestos plaintiffs because damaging evidence developed in the early years of asbestos litigation left Manville uniquely vulnerable to liability and punitive damages. "Indeed, plaintiffs' lawyers *to this day* attempt to recycle much of the damaging Manville evidence against new generations of asbestos defendants through latter-day allegations of conspiracy with Johns-Manville." *Id.* ¶¶ 13, 31 (emphasis in original).

26. Manville's status as the premier asbestos defendant also derived from its unique vulnerability to plaintiffs' failure to warn claims:

> In response to Manville's assertion of the "state-of-the-art defense" that it lacked knowledge of the hazards of asbestos until the mid-1960s, plaintiffs produced medical literature derived from publicly available sources dating back to the turn of the century and continuing into the 1930s, and beyond, that demonstrated a causal connection between asbestos and disease among asbestos and textile workers. Plaintiffs used this literature (and Manville's knowledge of it) to attack the state-of-the-art defense. In a similar vein, as the industry leader Manville sponsored industrial hygiene studies concerning asbestos and asbestos dust and, the plaintiffs argued, conspired to suppress the results of these studies from asbestos workers. For example, plaintiffs adduced evidence that Manville sponsored a 1930 study of mine workers at a Canadian subsidiary that showed as many as half of all its workers had developed asbestosis due to exposure to asbestos dust.

Id. ¶ 14; *see also id.* ¶ 13.

27. An especially critical body of evidence against Manville was happened upon early in the era of asbestos litigation, when plaintiffs uncovered the so-called "Sumner Simpson Papers," a series of letters between Sumner Simpson, President of Raybestos-Manhattan, and Vandiver Brown, a Manville attorney:

> The correspondence suggested that Raybestos and Manville were aware of the hazards of asbestos and that Simpson and Brown sought

> to minimize publicity regarding asbestosis by suppressing data and articles that otherwise would have been published in the trade journal "Asbestos." These documents also suggested that Mr. Brown may have encouraged a doctor to downplay his 1931 findings about the adverse effects of asbestos dust on the lungs of asbestos workers. Together, these documents quickly formed the basis for allegations that Manville participated in a coordinated conspiracy to suppress the hazards of asbestos.

Id. ¶ 15.

28. The evidence against Manville steadily mounted. Former Manville employees-including physicians employed by Manville-provided deposition and trial testimony that plaintiffs claimed showed: an awareness by Manville of the asbestos health risks as early as the 1940s; the difficulty of controlling asbestos dust; and Manville's suppression of information and failure to warn its workers and the public. Particularly damaging testimony purported to describe a policy and practice at Manville of requiring plant physicians to hide adverse test and x-ray results from their patients, the plant employees, out of a concern that Manville would lose manpower. *Id.* ¶ 16.

29. Kathleen Munroe, a longtime Travelers employee who headed the company's Asbestos Unit (a specialized division within Travelers formed to centralize all asbestos litigation against the company's insureds) and who supervised the defense efforts of Parnell and others,

testified extensively and credibly regarding the consequences of Travelers longstanding, close relationship with Manville. She explained:

> Manville, beginning in the late 1960's, tendered the defense of virtually every one of its third party asbestos lawsuits to Travelers, and Travelers funded Manville's defense efforts virtually *in toto*, including Manville's defense of *Borel*, *Tomplait* and *Karjala*, three of the first third-party asbestos lawsuits filed in the United States. From the late 1960's through Manville's bankruptcy filing, Travelers paid millions of dollars in counsel fees incurred in answering interrogatories and responding to document requests served on Manville, defending Manville witnesses at deposition, drafting legal memoranda, negotiating settlements on Manville's behalf and defending Manville at trial and on appeal in asbestos-related suits.

Munroe Decl. ¶ 6.

30. Ms. Munroe worked on the Manville account throughout the 1970s and 1980s and spent virtually all of her time from 1978 until Manville's primary products liability coverage was exhausted handling asbestos claims filed against Manville. *Id.* ¶¶ 2-3. Her testimony—which was based on both her extensive personal experience handling Travelers defense of Manville claims and on a number of documents from Travelers files accepted into evidence in this proceeding—was wholly unrebutted.

31. Ms. Munroe explained that Travelers Claims Examiners dedicated to the Manville account were required to—and did—review complaints filed against Manville, pay and work with defense counsel litigating on behalf of Manville and became familiar with Manville's asbestos history and business operations, as well as Manville's defenses to liability, such as state of the art:

> As part of my responsibilities, I regularly received documents pertaining to asbestos related issues as part of the normal claims handling process. As discussed further below, in order to fulfill Travelers defense responsibilities under the Manville policies, I needed to be aware of Manville's knowledge regarding the hazards of asbestos (at least what was conveyed to me by Manville or its counsel) and the issues that Manville was facing in the litigation.

Id. ¶ 4; *see also id.* ¶ 14.

32. Manville's assertion of the state of the art defense in particular required Travelers to learn information about Manville's asbestos claims and its historic dealings with asbestos, including files relating to Manville's knowledge and understanding of the hazards of asbestos. *Id.* ¶ 15. To this end, "Travelers organized a number of seminars at which Manville and its national coordinating counsel educated Travelers and local defense counsel as to Manville's history and its experience with asbestos." *Id.* ¶ 16. These seminars involved detailed presentations by Manville representatives regarding Manville's extensive

research and analysis of asbestos hazards, and "whether and to what extent Manville could assert the 'state of the art' defense to liability." *Id.* In short, it was "[t]hrough Manville" that "Travelers became experienced in the handling of asbestos cases." *Id.* ¶ 14.

33. Travelers duties under the policies also required it to settle and pay claims where appropriate. Ms. Munroe testified regarding her personal negotiation of numerous settlements on behalf of Manville, all of which were undertaken in her capacity as a claim representative for Travelers. One of the settlements she negotiated was among the first bulk settlement for Manville with Ron Motley of the Ness, Motley firm (as it was then known) in a group of cases in South Carolina. *Id.* ¶ 18.

34. In order to engage in such negotiations—and evaluate whether (and for how much) to settle—Travelers claims representatives were apprised of the nature of the claims that plaintiffs were asserting against Manville, the strengths and weaknesses of plaintiffs' cases, and the validity and persuasiveness of Manville's defenses. *Id.*

35. Travelers paid for Manville's defense until coverage was exhausted, *id.* ¶ 6, employing numerous claims examiners to work full-time on Manville asbestos claims, *id.* ¶ 7." No other Travelers insured with asbestos-related claims commanded as much work" as those dedicated to Manville. *Id.*

36. Ms. Munroe's testimony and the documentary record of internal Travelers materials from

that era demonstrates that Travelers believed such extensive resources were warranted because —from the very outset of asbestos litigation —Manville's prominence and ubiquity made it the primary target of the plaintiffs' bar. *Id.* ¶ 8.

> In each of the thousands of asbestos cases in which it was sued, Manville faced significant exposure and was assessed or held responsible for the largest share of any settlement or verdict. While several other defendants that were insured by Travelers were able to obtain voluntary dismissals or early, discounted settlements because of questionable product identification, Manville's asbestos fiber and products had been distributed so widely that it tended to be the last defendant involved in the proceeding and often the only defendant to proceed to trial.

Id. ¶ 9.

37. Ms. Munroe explained that Manville recognized early in the litigation that coordination among asbestos defendants would inure to its benefit:

> Manville thus took the lead in organizing joint defense groups to coordinate the defense of asbestos-lawsuits. Company-specific information was not shared in these groups, but defendants did discuss common strategy and settlement issues. Because Manville was the primary target of every case and because Manville was often the last defendant left at trial after other defendants had settled or been voluntarily dismissed,

> the Manville attorneys typically took a leading role in pending proceedings, served as lead counsel on joint defense issues and also served as liaison counsel when the court requested that defendants appoint a single spokesperson.

Id. ¶ 10.

38. Manville's leading role—and the high stakes it faced in each case—allowed co-defendants to repose in Manville's efforts, with Manville counsel leading joint defense efforts (including discovery, briefing of common legal issues, and serving as lead trial counsel). *Id.* ¶ 11. Further, Manville representatives-including Travelers-participated in all joint settlement negotiations. *Id.*" In the minority of cases in which Manville settled before other defendants, plaintiffs sought to dismiss lawsuits against Manville to remove Manville's defense team, which was considered the most knowledgeable and experienced in asbestos defense." *Id.* ¶ 11.

39. Ms. Munroe's testimony—persuasive enough in its own right—was buttressed with a wealth of documentary evidence that provides even further context. Among the documents presented for the Court's consideration were:

> Summaries of discussions between Manville and Travelers detailing a 1964 conversation about occupational hazards of asbestos and medical studies concerning asbestosis, a 1966 discussion relating to an asbestos-related workers compensation claim, and a 1968 discussion relating to a mesothelioma claim.

A 1978 overview of asbestos litigation for the Chairman of Travelers and various other high-level officers and that focuses exclusively on Manville.

See Id. Tabs B-O (Exs. 70, 52, 54, 57, 32-36, 79, 31 & 39, 51, 40, 81, 46, 45, 43 & 44, 80).

40. This last document is particularly telling:

"Because of the leadership position held in the industry, Johns-Manville has been targeted by plaintiffs in most, if not all of the pending asbestos litigations. In those few suits that have been tried to a conclusion, Johns-Manville has been forced to supply most of the expert witnesses and to carry the bulk of the defense, since they are the primary target in most of this litigation. In addition, attempts have been made by codefendants in this litigation to hold Johns-Manville solely responsible. Johns-Manville has conducted most of the medical research on the part of the asbestos industry and was the first to add warnings about the potential dangers of this product as part of its product labeling. Despite this fact the Johns-Manville Corporation has been marked as the villain both by plaintiff and codefendant alike."

Id. Tab B (Exhibit 70 at T1564373-74).

41. These internal Travelers memoranda confirmed that asbestos and Manville were inescapably linked for a variety of reasons, such as Manville's dominance as a manufacturer and seller of raw asbestos and asbestos-containing products and its prominence in the litigation.

These documents confirm what is intuitively obvious to anyone involved at the time, namely that from Travelers perspective, issues relating to asbestos and the hazards of asbestos and asbestos litigation went hand-in-hand with Manville, the largest manufacturer of asbestos, target defendant, and long-time Travelers insured. Munroe Decl. ¶ 27, 31.

42. Other companies were named as defendants in asbestos suits then as they are now. But their limited market share (and the related issue of difficult product identification), as well as Manville's status as a particularly easy target—with deep pockets and the potential problematic evidence available against it—resulted in these other defendants taking a more circumscribed role in the defense of cases, as well as being voluntarily dismissed or settling early for modest sums. Parnell Decl. ¶ 17.

43. Manville, in turn, was required to assume the leading role in the defense of cases in which it was named as a defendant—which, of course, was essentially every asbestos case filed in the United States. Manville had assembled a significant legal team and was far more prepared to defend cases on the merits, often taking them to trial. This required Manville's lawyers to familiarize themselves with all aspects of the defense of asbestos personal injury claims—including the historical scientific record pertaining to the hazards of asbestos, as well as Manville's institutional knowledge of that record—and to develop experts, sponsor the state of the art defense and act in a coordinating capacity for other asbestos

defendants to ensure a unified, industry-wide defense. *Id.* ¶¶ 18-21.

44. Perhaps the best indication of the importance of Manville to the plaintiffs bar, however, is the fact that—notwithstanding its bankruptcy and resulting immunity from suit—asbestos plaintiffs still litigate against the "ghost" of Manville by attempting "to place asbestos defendants into the shoes of Manville through 'conspiracy' theories to tarnish the defendants with the old and damaging Manville evidence discussed above":

> As pithily phrased by one prominent asbestos plaintiffs' lawyer from Texas (who is counsel in some of the common law cases against Travelers), "if a plaintiff can successfully assert the conspiracy cause of action, *he can hold solvent defendants liable for the sins of Manville, Raybestos-Manhattan and a host of insolvent entities.*" By asserting broad conspiracies with Manville, plaintiffs hope to expand the universe of asbestos defendants to "hundreds of formerly 'peripheral' companies" and to breathe new life into asbestos litigation "in the 21st century."

Id. ¶ 30 (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6-7, 2001 (Am.L.Inst.2001)) Ex. 18 (emphasis added).

45. Indeed, Mr. Parnell testified that based on his personal knowledge and experience in defending asbestos cases for the past 30 years, Mr. Lanier's suggested strategy has been widely followed by the asbestos plaintiffs' bar, and that

plaintiffs' lawyers routinely introduce much of the damaging Manville evidence—such as the Sumner Simpson Papers—against today's asbestos defendants. "It is very common for complaints to name Manville and assert Manville-related conspiracy allegations in the body of such complaints despite the fact that Manville cannot be sued in the tort system." *Id.* ¶¶ 30-31.

46. The evidentiary basis for asserting a conspiracy theory between Manville and a solvent company may, according to Mr. Lanier, be based on "[r]elatively innocuous things like one asbestos company investing in another or being present at meetings with Manville representatives," all of which "can be portrayed as sinister combinations designed to defraud workers."If this type of "evidence" has value to plaintiffs, facts based on the course of Travelers 29-year insurance relationship with Manville undoubtedly would be relied upon by plaintiffs. Priest Decl. ¶ 51.

iii. Travelers Knowledge Of The Hazards Of Asbestos Arise From, Are Based Upon And Relate To Its Obligations Under The Policies It Issued To Manville

47. Travelers knowledge of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations and generally through its lengthy and confidential

insurance relationship under the policies. Munroe ¶ 38; Parnell ¶ 32 ("Based on my relationship with Travelers and my knowledge of the Manville account, I believe that Travelers knowledge of the hazards of asbestos is necessarily intertwined with its insurance relationship with Manville and its obligations under the insurance policies it issued to Manville. That knowledge would have been derived from a number of contexts as explained above, including through Travelers defense obligations and generally though its lengthy and confidential insurance relationship under the Manville policies."); *see also* Priest ¶ 16 ("Given Travelers lengthy insurance relationship with Manville and its role in providing for Manville's defense when the company was faced with an onslaught of asbestos-related personal injury claims, and the significance of Manville in terms of asbestos litigation and the prevalence of asbestos and asbestos-containing products, in my opinion Plaintiffs' allegations are based upon Travelers insurance relationship with Manville and its obligations under the policies."); 7/6/04 Tr. at 33 (the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville) (testimony of Prof. Priest).

48. In short, the evidence adduced at the hearing—particularly the testimony of Messrs. Parnell and Priest and Ms. Munroe—persuasively demonstrates that in connection with its insurance relationship with Manville, Travelers gained knowledge of asbestos and asbestos-related health litigation through its underwriting of the Manville policies, inspection of Manville

plants, investigations of asbestos-related claims against Manville, defense of lawsuits against Manville, and negotiations of settlements of asbestos-related lawsuits against Manville. Every dollar paid by Travelers on account of Manville—whether to Manville itself, to outside defense counsel hired to defend Manville, to Travelers employees inspecting or investigating Manville facilities or claims, or to asbestos claimants in satisfaction of judgments against or settlements with Manville—correlated to a specific provision in the policies that Travelers issued to Manville. *See generally* Priest Decl. ¶¶ 18-28 (describing the extensive duties assumed when an insurer underwrites a risk).

49. During argument and in cross-examination, objectors referenced other Travelers policyholders with asbestos-related liability. Tellingly, other than acknowledgement of the undisputed fact that there were other such insureds, the Court was not presented with a scintilla of evidence regarding the scope, duration or intensity of any such relationship. Nor has any evidence been presented that even calls into question Travelers extensive showing regarding the centrality of Manville to the asbestos crisis, the company's potential exposure as a result of its intimate involvement with all aspects of asbestos mining and manufacturing, the sheer volume of cases against Manville, and the longstanding relationship between Travelers and Manville. *See also* Munroe Decl. ¶ 12 ("No other Travelers policyholder was sued in the number of asbestos cases in which Manville was named. No other

Travelers policyholder had been involved with asbestos as prominently and extensively as Manville. No other Travelers policyholder assumed such a prominent leadership role in the formulation of cooperative efforts to defend asbestos-related litigation."). Moreover, on cross-examination, Professor Priest a recognized expert in insurance litigation, testified that the relevant factual allegations in the Direct Action Claims against Travelers "inescapabl[y]" relate to its insurance relationship with Manville. 7/6/04 Tr. at 33. His testimony was unrebutted.

50. Given the extensive and unrebutted evidence that no other Travelers policyholder was sued in the number of asbestos cases in which Manville was sued, no other Travelers policyholder commanded the degree of Travelers resources as Manville, no other Travelers policyholder was involved with asbestos as prominently and extensively as Manville had, and no other Travelers policyholder assumed such a prominent leadership role in the formulation of cooperative efforts to defend asbestos-related litigation as Manville did, the Court concludes as a factual matter that Manville was without peer among Travelers insureds and that Travelers learned virtually everything it knew about asbestos from its relationship with Manville.

II. THE MANVILLE BANKRUPTCY

51. The Manville bankruptcy filing was simply without precedent. *See, e.g., Kane v. Johns-Manville Corp.*, 843 F.2d 636, 638 (2d Cir.1988) (describing Manville as "one of the nation's most

significant Chapter 11 bankruptcy proceedings"); *In re Johns-Manville Corp.*, 68 B.R. 618, 624-25 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987), *aff'd*,843 F.2d 636 (2d Cir.1988) ("[T]his court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings.").

52. The "ultimate challenge" facing the Court, Manville, and the parties in interest was the crafting of "a plan of reorganization for the Debtors which would provide for payment to holders of present or known asbestos health related claims . . . and those persons who had not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time"—and to do so using only the broken shards of a Fortune 500 company that had been crushed by the weight of a century-long entanglement with asbestos. *In re Johns-Manville Corp.*, 97 B.R. at 176.

53. Early in the reorganization process, the Court recognized that the fundamental precept of a Manville reorganization was obtaining funds through a settlement with Manville's insurers. *In re Johns-Manville Corp.*, 33 B.R. 254, 267 (Bankr.S.D.N.Y.1983).

54. There were several obstacles. These included finding a way to incentivize the insurers such as Travelers to settle, given that Manville and its insurers were locked in a contentious, costly and time-consuming coverage dispute. *E.g.*, *In re Johns-Manville Corp.*, 33 B.R. at 267 & 270 (observing the uncertainty in value of the

policies given that "Travelers may be able to establish in the California litigation that Manville is not entitled to coverage under its policies"); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir.1988) (noting the "extensive litigation [between Manville and] its insurance carriers concerning its coverage for asbestos-related liabilities").

55. Travelers also was enmeshed in direct action litigations in Louisiana, where certain Manville factory workers contended that they should be able to recover directly from Travelers by virtue of its insurance relationship with Manville. *See, e.g., Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims by Manville factory workers against Travelers); *In re Johns-Manville Corp.*, 33 B.R. at 264 (ordering that "[a]ll entities are hereby stayed, restrained and enjoined from commencing, conducting or continuing any suits against any past, present or future officer, director or employee of Manville *or against their insurers* in direct action suits whether such direct action suits arise by statute or at law or in equity") (emphasis added).

56. Additionally, Travelers faced claims from vendors of Manville products, who claimed that Travelers owed duties arising out of its insurance policies and relationship with Manville. *See, e.g., MacArthur*, 837 F.2d at 90-91 (discussing one such claim).

57. Finally, there were a host of contribution claims, cross claims and indemnity claims between and among virtually every company that

had insured Manville in its long history. *Cf., e.g.*, Ostrager Aff. Ex. A ¶ 5(a) (referencing "indemnification, contribution or other reimbursement based upon, arising out of or related to any or all of the Policies").

58. Ultimately, the Court facilitated a consensual resolution whereby Travelers paid nearly $80 million into the bankruptcy estate (in addition to the $20 million already paid in litigation against Manville) in exchange for a full and final release of Manville-related claims. In order to achieve this resolution, Travelers insisted on finality and a full and complete release of liabilities that were in any way related to or based on Manville.

A. The Entry Of The Insurance Settlement Order And The Confirmation Order

59. Numerous objections to the Manville-Travelers settlement were filed. The grounds ran the gamut: some claimed the settlement was "aleatory," others claimed it was "illusory"; still others claimed it was "vague" and "non-binding." *See* Manville Memorandum dated Mar. 18, 1985 (attached as Ex. A to SCB's June 28, 2004 objection) at 7, 9, 11, 16.

60. After full consideration of all objections, and after an extensive series of hearings and oral arguments on the feasibility, fairness and appropriateness of the settlement, the Court overruled the objections, approved the settlement agreement, and entered the necessary orders to fully and finally extricate Travelers from the Manville

morass. The settlement, which the Second Circuit has recognized as the "cornerstone" of the Manville reorganization," *MacArthur*, 837 F.2d at 90, has been final for two decades.

61. The Insurance Settlement Order consisted of an interlocking web of protections:

> The *channeling* of all claims to the Manville Trust: "any and all claims . . . based upon, arising out of, or related to any or all of the Policies . . . are transferred, and shall attach, solely to the Settlement Fund. . . ." Ostrager Aff., Ex. D at 1.2(B), 2.2(B), 23.2(D).
>
> The *release* of the settling insurers: "Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims. . . ." Ostrager Aff., Ex. D at 1.2(C), 2.2(C); *accord id.* at 23.2(E).
>
> A *permanent injunction*, specifically prohibiting all future claims for bad faith or insurer misconduct: "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group. . . ." Ostrager Aff., Ex. D at 23.2(F); *accord id.* at 1.2(D), 2.2(D).

62. The core defined term in this matrix—"Policy Claims"—is comprehensive in scope, including:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

Ostrager Aff., Ex. D at 23.1.

63. The Insurance Settlement Order was specifically incorporated into the Confirmation Order. Ostrager Aff. ¶ 14, Ex. F at Finding (gg).

64. Moreover, the Confirmation Order permanently enjoins "all persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation. . . ." Ostrager Aff., Ex. F at Decretal 29 (emphasis added).

B. Claims Against The Manville Trust

65. Because of the insurance settlements, the Trust has already distributed billions of dollars to asbestos victims:

> The Trust has received more asbestos claims than any defendant in the tort system, and more asbestos claims than any other asbestos trust. By a recent count, the Trust has received over 740,000 claims, and it contin-

> ues to receive record numbers of claims. The Trust received almost 91,000 claims in 2001, 56,000 claims in 2002, and 101,000 in 2003. To date, the Trust has paid over 606,000 claims totaling approximately *$3.2 billion*.
>
> Austern Decl. [Ex. 247] ¶ 10 (emphasis added). Professor Priest has testified that "participation of insurers" in large-scale settlements such as that orchestrated in Manville "is *critical* because the insurers provide substantial sources of funding." Priest Decl. ¶ 58 (emphasis added).

66. The testimony presented at the hearing by David Austern, who, as noted previously, has been the Manville Trust's General Counsel for the past 17 years, confirms that Manville Trust claimants have already been compensated for insurer claims under the existing Manville Trust procedures. This testimony was not challenged. Specifically, Mr. Austern testified that:

> The court-approved Trust Distribution Procedures were designed to compensate fully Trust claimants for *all liabilities* channeled to the Trust, whether the liability arises from actions by Johns-Manville Corporation *or the Settling Insurance Companies[] liability to Manville related to or arising out of the insurance policies issued to Manville.*The Trust settlement values *already compensate* claimants for any liabilities channeled to the Trust, including any channeled insurer liabilities.

Id. ¶ 18 (emphasis added).

67. Consistent with this intent, Trust Claimants are required to execute broad releases. The Trust has used three different forms of release in the nearly 16 years it has been operational. Each form of release that Trust claimants sign upon settling their Trust claims resolve claims against Settling Insurance Companies, including Travelers. The release defines Released Parties as including "the Trust, Manville Corporation and all subsidiaries, all Settling Insurance Companies. . . ." *Id.*Tab 2 (Exs.15-17).

68. The releases are broadly drafted to release the Released Parties—including the Settling Insurance Companies—from all further liability. They state:

> I further agree *that this Release extends to all my rights and claims of any kind against the Released Parties [including the Settling Insurers], whether based in tort, contract, fraud or any other legal or equitable theory,* and whether I possess them now or may possess them in the future. * * * I fully release, waive and discharge all rights or claims of any kind against the Released Parties allegedly resulting from my exposure to asbestos and/or asbestos containing products that were manufactured, distributed or sold by the Released Parties, including claims I now possess or may later possess because of any matter or thing done, omit-

> ted or suffered to be done by the Released Parties prior to and including today. . . .

Id. at 2 (emphasis added).[5]

69. Dr. Dunbar testified that the vast majority of plaintiffs in the pending actions—"between 95.8 percent and 96.9 percent"—can be expected to have already filed a claim against the Manville Trust, Dunbar Decl. ¶ 20, and thus would have executed this broad release.

III. THE DIRECT ACTION LAWSUITS

70. Notwithstanding the Court's Confirmation Order, the Insurance Settlement Order incorporated therein and the voluntary releases executed by over 660,000 claimants described above, plaintiffs' attorneys have filed complaints against Travelers in several states under a variety of legal theories (the "Direct Action Lawsuits").

71. While the Direct Action Lawsuits advance what purport to be different theories of liability—some rely on statutes regarding insurance settlement practices, others on common law notions of civil conspiracy and negligent undertaking—Professor Priest testified that they constitute one concerted front in a larger campaign by the asbestos plaintiffs' bar to " 'drag in more defendants, perhaps giving this litigation new life' when 'many of the traditional asbestos players are out of the game due to bankruptcy.' "

[5] The prior releases used by the Trust contain similar language of similar breadth. All of the releases used by the Trust have specifically included the Settling Insurance Companies as Released Parties.

Priest Decl. ¶ 50 (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6-7, 2001 (Am.L.Inst.2001)).

72. Although the Confirmation Order, Insurance Settlement Order and Manville Trust releases make no distinction between lawsuits that seek to collect "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Travelers] based upon, arising out of or relating to" the insurance policies Travelers issued to Manville—all such suits are categorically barred—the complaints that gave rise to the Motion tend to fall within two broad categories: those purportedly based on statutory regulation of insurance practices (the "Statutory Direct Action Lawsuits") and those purportedly based on common law theories (the "Common Law Direct Action Lawsuits").

A. The Statutory Direct Action Lawsuits

73. The Statutory Direct Action Lawsuits purport to assert the rights of a class of individuals who are dissatisfied with the settlement they received when they or their attorneys negotiated with, *inter alia*, Travelers acting on behalf of Manville, or who declined to file personal injury suits against, *inter alia*, Manville because of Travelers prior use of the allegedly-false state of the art defense.

74. These plaintiffs claim that Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices. For example, in the *Cashman* action, plaintiffs allege:

> Defendants conspired among and between themselves and the asbestos manufacturers and sellers to intentionally misrepresent and suppress relevant information regarding their insureds' knowledge of the hazards of asbestos and to minimize the full nature and extent of their insureds' products and the distribution of these products, in an effort to injure Plaintiffs and members of the proposed Class.

Ostrager Aff., Ex. O, *Cashman* Compl. ¶ 60; *see also* Munroe Decl. Tab P (Ex. 9) *Wise* Compl. ¶ 228; Munroe Decl., Tab P (Ex. 9) *Meninger* Compl. ¶ 55.

75. The *Cashman* plaintiffs, in the demand letter required under applicable Massachusetts law, elaborate:

> Under the contracts of insurance between insurers and manufacturers, insurers were bound to investigate and provide lawyers and financing to defend manufacturers and sellers in the asbestos litigation, and the insurers possessed the right to control the defense.

Frankel Aff., Ex. E, *Cashman* Letter pp. 28-29.

76. Plaintiffs contend that through early asbestosis claims from as far back as the 1950s, Travelers acquired knowledge about the dangers

of asbestos, recognized the potential for future escalation of asbestos litigation and began to influence Manville's purported failure to disclose knowledge about asbestos hazards. *Cashman* Letter pp. 15-18, 20-21, 22-27; *Wise* Compl. ¶¶ 115-17, 123, 127, 134-135.

77. The gravamen of the Statutory Direct Action Lawsuits centers on Travelers defense of Manville in asbestos-related claims, particularly during the period from the decision in the *Borel* case in 1973 and the filing of the Manville bankruptcy petition in 1982. These allegations, which run to dozens of pages in the more fully pled complaints and quote page after page of Travelers Manville-related documents in full text, form the heart of the complaints. *See, e.g., Cashman* Letter pp. 30-34, 40-46; *Wise* Compl. ¶¶ 156, 158-159, 163-164, 167, 174-175, 179-183, 185.

78. A consistent refrain throughout the complaints is the assertion that Travelers participated in the fraudulent perpetuation of the state of the art (or "no duty to warn") defense. Plaintiffs' allegations—and the documents quoted in the complaints—place Manville at the center of the development of this defense and the education of Travelers about the defense theory, and suggest that this happened in the course of Travelers' fulfillment of its duty to defend Manville under the Policies. *See, e.g., Cashman* Letter p. 40; *Wise* Compl. ¶ 179.

79. Plaintiffs further advance numerous allegations purporting to demonstrate that Travelers was responsible for coordination of the national

defense effort and development of the state of the art defense, *see Cashman* Letter pp. 29-30, 37, 40, 46; *Wise* Compl. ¶¶ 151, 173-175, 179-182, 199, 201, 202, and rely upon acts or statements by Manville or its counsel in connection with defense of the underlying lawsuits to demonstrate the purported misconduct of Travelers. *See Cashman* Letter p. 40, 42-43; *Wise* Compl. ¶¶ 180, 183, 193, 195.

B. The Common Law Direct Action Lawsuits

80. The Common Law Direct Action Lawsuits are similar to the Statutory Direct Action Lawsuits, especially in their fixation on the relationship between Travelers and Manville.

81. Picking up on the Manville conspiracy theories that have driven plaintiffs' lawyers for years, the common law plaintiffs assert that Travelers and the other defendants (which include dozens—in certain cases, hundreds—of asbestos product manufacturers, distributors and premises owners) are liable under various common law theories. A common law direct action plaintiffs' attorney Bruce Carter's affidavit candidly admits, no court has ever accepted these theories. Carter Aff. ¶¶ 23 & 28. These plaintiffs, too, are dissatisfied with their inability to collect directly from Manville, and thus attempt to collect Manville's debts by "Putting New Defendants In Manville's Chair." Priest Decl. ¶¶ 49-50.

82. Specifically, they allege that Travelers violated certain alleged duties to them when it failed to disclose what it learned from Manville

in the course of its long tenure as Manville's primary general liability insurer. The *Gilchrist* plaintiffs allege, for example, that Travelers negligently performed inspections, conspired to deprive plaintiffs of information regarding the risks of asbestos exposure, and misrepresented and suppressed information regarding asbestos—all because it did not share its Manville-gained asbestos knowledge. *See* Priest Decl. Tab D (Ex. 218) *Gilchrist* Compl. ¶¶ 187-238.

83. Similarly, the consolidated *West Virginia Mass Litigation* Complaint ("*WVA* Complaint") is replete with claims of harm flowing from Travelers insurance relationship with Manville:

> Travelers facilitated the presentation of fraudulent "state of the art" defenses while understanding, via Manville, that asbestos was hazardous. Ostrager Aff. Ex. J; *WVA* Compl. ¶¶ 299, 301, 304.
>
> Travelers wrote memoranda about the potential litigation crises that would arise from asbestos, again based on its insurance relationship with Manville. *See, e.g.*, *WVA* Compl. ¶¶ 279, 280, 287, 298, 299.
>
> Travelers learned about many asbestos claims in the 1950s, via Manville. *WVA* Compl. ¶¶ 276, 278, 279, 281, 284.
>
> "Johns-Manville and Travelers" set forth "sworn answers containing factual errors" in response to interrogatories. *WVA* Compl. ¶ 278.

> Travelers failed to disclose what it learned from defending Manville to the named plaintiffs and the class they purport to represent. *WVA* Compl. ¶¶ 303, 304, 319, 321.

84. The *Sorrels* Complaint, filed in Louisiana, contains similar allegations:

> Travelers "conspired" with Manville "to injure Plaintiff and others similarly situated." Ostrager Aff., Ex. M. *Sorrels* Compl. ¶¶ 46, 47.
>
> Manville, acting as agent for Travelers, misrepresented information concerning, among other things, "animal studies concerning the relationship between asbestos exposure and cancer." *Sorrels* Compl. ¶ 49(BB); *see generally id.* ¶¶ 49(A)-(GG).

85. The *Boudreaux* Complaint filed in Texas follows the same pattern:

> Travelers acted in concert with "the Johns-Manville Corp." to "deceive and misinform decedents." Ostrager Aff., Ex. N *Boudreaux* Compl. ¶ 76; *see generally id.* ¶¶ 69-95.
>
> Travelers "undertook to perform a duty owed by their insureds to the Plaintiffs and decedents . . ." *Boudreaux* Compl. ¶ 98; *see generally id.* ¶¶ 96-103.

86. The *Serra* Complaint, filed in Massachusetts, alleged:

> Travelers and Manville conspired to "withhold, alter, suppress and misrepresent

information about the effects of asbestos exposure." *Serra* Compl. ¶ 33; *see generally id.* ¶¶ 33-37.

". . . Travelers Companies, Manville, Raymark and/or their predecessors in interest knowingly agreed . . . and conspired among themselves to cause plaintiff injuries . . . by exposing plaintiff to harmful and dangerous asbestos containing products . . ." *Serra* Compl. ¶ 34.

Because of its relationship with Manville, Travelers owed a duty to plaintiff to "warn the plaintiff of the dangers to which he was exposed when they knew of the dangers." *Serra* Compl. ¶ 35(b)(iv).

Travelers undertook duties owed by Manville to plaintiff "by testing of asbestos workers and the conduct of scientific studies." *Serra* Compl. ¶ 38; *see generally id.* 38-43.

87. The *Adkins* plaintiffs elaborate:

[T]he defendant insurance companies sold policies of insurance to employers, manufacturers and distributors and installers of asbestos containing products. *As part of this process, the defendants analyzed the risk associated with the use of asbestos containing products,* the occurrence of disease in workers using such products, the claims made against employers and others, and *methods of defending claims* arising from exposure to asbestos.

Adkins Compl. ¶ 86 (emphasis added).

88. The alleged factual predicate of the common law claims is essentially identical to the statutory actions: Travelers acquired knowledge about the dangers of asbestos from claims in the 1950s, recognized the potential for future escalation of asbestos litigation and began to influence Manville's purported failure to disclose knowledge about asbestos hazards, *e.g.*, *Darden* Compl. ¶¶ 49-51, 72; *WVA* Compl. ¶¶ 272, 278-80, 287, 296, 299; Travelers defended Manville, *e.g.*, *WVA* Compl. ¶¶ 303-305, 307, 315-16; Travelers advanced the state of the art defense, *e.g.*, *Darden* Compl. ¶ 104; *Gilchrist* Compl. ¶ 164; *Searls* Compl. ¶¶ 8-9; *WVA* Compl. ¶¶ 299, 301, 304; and Travelers coordinated Manville's national defense effort, *e.g.*, *Darden* Compl. ¶¶ 77, 98-100, 104-107, 122, 126; *Gilchrist* Compl. ¶¶ 164-65, 179, 181-82, 185-86; *Searls* Compl. ¶¶ 4, 5, 7; *WVA* Compl. ¶¶ 302, 310-12.

89. After the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term "Manville" from their complaints—but leaving the substance unchanged.

90. In the *Wise* complaint, for example, plaintiffs had alleged:

> By at least June, 1969, Travelers began instructing its field people to mail liability files of asbestosis and Worker's Compensation files involving subrogation. By doing so, Travelers would get *"control over litigation"* involving the above insured [Johns-Manville

> Products Corporation] or any other insured who might be exposed to claim or suit through manufacturing or selling of products containing asbestosis.

Munroe Tab P, Ex. 9 *Wise* Compl. ¶ 139 (emphasis added). The *Darden* Complaint, however-which was filed after this Court's initial TRO—conveniently omits the term "Manville":

> "By at least June, 1969, Travelers began instructing its field people to mail liability files of asbestosis and Worker's Compensation files involving subrogation. By doing so, Travelers would get "control over litigation involving the above insured or any other insured who might be exposed to claim or suit through manufacturing or selling of products containing asbestosis."

Darden Compl. ¶ 68.

91. Similarly, while the plaintiffs in *Wise* made the following allegation:

> Throughout the 1970s and 1980s, *Manville and Travelers continued to work closely in their common interest* of defending and defeating the growing asbestos litigation and continued their ingenious promotion of the "no knowledge and no duty to warn" and "state of the art" defenses.

Wise Compl. ¶ 179 (emphasis added). *Darden*, however, merely omits the term "Manville":

> Throughout the 1970s and 1980s, *Travelers continued to work toward the interest* of defending and defeating the growing asbestos

> litigation and continued their ingenious promotion of the "no knowledge and no duty to warn" and "state of the art" defenses.

Darden Compl. ¶ 104 (emphasis added).

92. Similar deletions of "Manville" can be found throughout the common law complaints. *Compare, e.g., Wise* ¶ 195 with *Darden* ¶ 119; *Wise* ¶ 198 with *Darden* ¶ 121; *Wise* ¶ 199 with *Darden* ¶ 122. *See also* Transcript of Aug. 1, 2002 Hearing at 60-61 ("[The Court:] As I indicated, I can rule on [the Motion] today. But the possibility that all that is going to happen is a reworking and exorcising and massaging of the complaints ultimately to keep the parties at each other, I think it may help to gain some finality here.").

IV. THE DIRECT ACTION SETTLEMENT AGREEMENTS

93. Travelers has contended throughout this proceeding that the Direct Action Claims are barred by the Court's prior orders, including the Confirmation Order and the Insurance Settlement Order. Nonetheless, under the auspices of the Mediator, Travelers reached a series of landmark settlement agreements that will provide nearly a half billion dollars in additional compensation for asbestos victims.

94. While there is no distinction in the Confirmation Order, the Insurance Settlement Order and the Releases signed by Manville claimants between the Statutory Direct Action Lawsuits and the Common Law Direct Action Lawsuits, or between claims arising under the laws of Hawaii

and those arising under the laws of other states, the settlement negotiations progressed such that three separate settlement agreements were reached.

95. The Mediator has reported that each such settlement was "the product of good faith, arms-length negotiations" among the parties, and the Court agrees. Mediator's Final Report ¶ 4.

A. The Statutory Direct Action Settlement Agreement

96. In November 2003, Travelers reached an agreement with the statutory settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $360 million to a settlement fund which will be used to compensate plaintiffs with statutory-based claims similar to those asserted in the *Wise* and *Cashman* cases under the laws of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina or West Virginia (the "Statutory Direct Action Settlement Agreement").

97. According to Travelers and the Statutory Direct Action Settlement Counsel, the selection of the eleven states is related to the risk that third-party claimants in those states may assert a cause of action directly against insurers and the number of potential claimants in those states.

98. The Statutory Direct Action Settlement Agreement provides for the creation of a fund to compensate plaintiffs in accordance with the Set-

tlement Fund Distribution Procedures as established in Exhibit C to the Settlement Agreement.

99. Among other terms and conditions of the Settlement Agreement, the agreement requires plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the statutory direct actions or from the protection provided under this Court's injunctions.

100. A condition of the Statutory Direct Action Settlement Agreement is that this Court issue a ruling clarifying the applicability of the injunctions contained in the Confirmation Order to statutory direct action claims that have or may be brought under the statutes, laws or regulations of the eleven states at issue.

B. The Common Law Direct Action Settlement Agreement

101. In May 2004, Travelers reached an agreement with the common law settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $70 million to a settlement fund which will be used to compensate plaintiffs with claims such as those advanced in *Gilchrist* (the "Common Law Direct Action Settlement Agreement").

102. The Common Law Direct Action Settlement Agreement provides for the creation of a substantial fund to compensate plaintiffs in accordance with settlement fund distribution pro-

cedures that will be created in connection with the Settlement Agreement.

103. Among other terms and conditions of the Common Law Direct Action Settlement Agreement, the agreement requires plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the common law direct actions or from the protection provided under this Court's injunctions.

104. A condition of the Common Law Direct Action Settlement Agreement is that this Court issue a ruling clarifying the applicability of the injunctions contained in the Confirmation Order to common law direct action claims that have been brought or may be brought in the future.

C. The Hawaii Direct Action Settlement Agreement

105. In May 2004, Travelers reached an agreement with the Hawaii settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $15 million to a settlement fund which will be used to compensate plaintiffs with claims that meet the eligibility criteria set forth in the Fund Distribution Procedures.

V. THE PARTIES' NOTICE PROGRAM

A. Notice Of The Statutory Direct Action Settlement Agreement

106. On March 30, 2004, the Court entered an Amended Scheduling Order approving a process of notifying all parties potentially affected by the Statutory Direct Action Settlement Agreement.

107. Pursuant to the Court's order, the CRMC and Connecticut Valley Claim Service Company ("CVCSC") compiled a list of all potentially affected claimants and their counsel. Austem Decl. [Ex. 27] ¶ 20. This "comprehensive list of all Manville claimants" was developed by combining CRMC's database of claimants with a listing of claimants who had filed against Combustion Engineering and/or H.K. Porter with the CVCSC. *Id.* 18, 20. The combined data identified a total of 159, 114 affected claimants. *Id.* 20.

108. CRMC provided Poorman-Douglas Corporation ("PDC") with this list of the affected claiments, separating those not represented by counsel from those represented by counsel (with the latter group accompanied by the name and address of their attorneys). *Id.* ¶ 21. On March 29, 2004, PDC sent the *pro se* affected claimants a Court-approved cover letter providing detailed instructions and a notice package. Prutsman Decl. ¶ 10.

109. On the same day, the 601 law firms representing the remaining affected claimants were sent a Court-approved letter providing detailed instructions, a notice package, and a certification

form requesting that the law firms confirm their representation of the claimants. *Id.* ¶ 9. CRMC received executed certification forms from firms representing 154,377 of the 159,114 affected claimants (approximately 97%). Austem Decl. [Ex.27] ¶¶ 23-24.

110. On April 9, 2004, CRMC provided PDC with a list of all affected claimants whom counsel (1) certified they no longer represented or (2) did not return an executed certification. Prutsman Decl. ¶ 11. These claimants were sent notice of the Statutory Direct Action Settlement via U.S. Mail. *Id.* PDC was unable to locate valid addresses for 893 of these uncertified claimants, and a records check reveals that 257 of them were deceased. *Id.* ¶ 12.

111. Additionally, the parties placed notices of these proceedings in newspapers nationwide. A Statutory Direct Action Settlement notice appeared in 331 newspapers across the United States, primarily focused in the eleven affected states. Finegan Decl. ¶ 23. The daily circulation in the eleven affected states was 8,867,841, with a readership of 20,192,073. *Id.* ¶ 24. The Sunday circulation was 10,015,697, with a readership of 24,408,253. *Id.*

112. In the 39 remaining states and the District of Columbia, notice was published in the top two general circulation newspapers. *Id.* ¶ 25. Notices were also published in an additional twenty-six newspapers specially selected to enhance the reach to *pro se* affected claimants. *Id.* Notices were published in a total of 106 newspapers in the non-affected states and the District

of Columbia. *Id.* The daily circulation was 19,456,628, with a readership of 44,302,741. *Id.* The Sunday circulation was 25,624,209, with a readership of 62,446,197. *Id.*

113. The notice campaign was demographically tailored to reach those most likely to be affected. The Simmons Research Bureau ("SMRB") calculated that the combined daily and Sunday newspaper notices reached approximately 79.06% of men 55 years of age and older, and 73.11% of men 35 years of age and older in the newspaper markets. ¶ 25. The combination of daily newspaper notices reached an estimated 70.20% of men 55 years of age and older, and 63.63% of men 35 years of age and older. *Id.*

114. Wachovia was retained to establish a toll-free telephone number to receive calls relating to the Statutory Direct Action Settlement notice program, and when requested, forward the caller written information. Laskiewicz Decl. ¶ 4. From March 31, 2004 to April 9, 2004, the call center was operational from 9 a.m. EST until 9 p.m. EST, seven days a week. *Id.* ¶ 7. On April 9, 2004, operational hours were reduced to 9 a.m. EST until 5 p.m. EST. *Id.* From March 31, 2004 to June 29, 2004, the call center received a total of 1,133 calls, 650 requests for information packets, and sent 650 information packets to interested callers. *Id.* ¶ 9.

115. Additionally, Statutory Direct Action Settlement Counsel created and maintained a web site (www.DirectActionSettlement.com) to provide additional notice to potentially affected claimants via the internet. Visitors to the web-

site were able to view information about the settlement and download the Settlement Agreement, Scheduling Order, and the pleadings at issue in this action.

B. Notice Of The Common Law Direct Action Settlement

116. On June 9, 2004, the Court entered a Second Amended Scheduling Order approving a process of notifying all parties potentially affected by the Common Law Direct Action Settlement Agreement.

117. Pursuant to this order, CRMC provided PDC with a complete list of all claimants who had filed against the Manville Trust. Prutsman Decl. ¶ 16. PDC created two mailing lists: one listing all claimants and the other listing all counsel whose claimants had filed claims with the Manville Trust. *Id.* On or before June 7, 2004, PDC sent a notice to each of the 4,197 law firms and to each of the 663,694 affected claimants who had filed against the Manville Trust. *Id.* ¶ 17. After the initial mailing, PDC mailed additional notices to 337 law firms and 11,347 claimants after receiving information regarding changes of address and law firm affiliations. *Id.*

118. A Common Law Direct Action Settlement notice was placed in 531 newspapers across the United States, including national publications and the top ten newspapers in all fifty states by metropolitan area and circulation. Finegan Decl. ¶ 31. The notice appeared multiple times in most

newspapers, and was published a total of 1,059 times. *Id.* ¶ 32.The daily circulation of the notice was 45,274,973, with a readership of 102,556,906. *Id.* The Sunday circulation of the notice was 49,420,149, with a readership of 120,436,903, reaching almost forty-seven percent of all United States households. *Id.*

119. SMRB calculated that combined, the daily and Sunday newspaper advertisements reached about 79.06% of men 55 years of age and older, and 73.11% of men 35 years of age and older in the newspaper markets. *Id.* ¶ 33. The combination of daily newspaper advertisements reached an estimated 70.20% of men 55 years of age and older, and 63.63% of men 35 years of age and older. *Id.*

120. Wachovia was retained to establish a toll-free telephone number to receive calls relating to the Common Law Direct Action Settlement notice program, and when requested, forward to the caller written information. Laskiewicz Decl. ¶ 10. From June 6, 2004, the call center was operational from 9 a.m. EST until 9 p.m. EST, seven days a week. *Id.* ¶ 13. From June 6, 2004 to June 29, 2004, the call center received a total of 26,274 calls, 19,751 requests for information packets, and sent 18,124 information packets to the interested callers, with 1,627 packets remaining to be sent to the callers who most recently requested information. *Id.* ¶ 15.

121. Wachovia also established an Internet web site (www.jminsurersettlement.com), which posted information pertaining to the settlement and hearing, including the Court-approved notices,

selected pleadings, the Court's prior scheduling orders and the settlement agreement itself. *Id.* ¶ 16. Through June 29, 2004, the web site was visited over 8,000 times, and nearly 4,000 registered users had downloaded documents. *Id.* ¶ 17.

C. Notice Of The Hawaii Direct Action Settlement Agreement

122. On June 3, 2004, the Court entered a Second Amended Scheduling Order approving a process of notifying all parties potentially affected by the Hawaii Direct Action Settlement Agreement.

123. Pursuant to this Order, CVCSC compiled a list of all Hawaii Direct Action Claimants potentially affected by the settlement. Prutsman Decl. ¶ 18. PDC assisted in the certification and direct mailing to the Hawaii Direct Action Claimants. *Id.* Two law firms certified they represented the "vast majority" of claimants, excluding eleven *pro se* claimants and thirty-one claimants that were no longer represented by either firm. *Id.* Notices were sent directly to the eleven *pro se* and thirty-one non-represented Hawaii Direct Action Claimants. *Id.* ¶ 19.

124. The notice of the Hawaii Direct Action Settlement Agreement was also published twice in six newspapers in Hawaii, for a total of twelve advertisements. Finegan Decl. ¶ 39. The daily circulation of the newspapers was 265,751, with a readership of 605,115. *Id.* The Sunday circulation of the newspapers was 303,221, with a readership of 738,949. *Id.*

125. In addition, a toll-free call center and Internet site (www.gogaliher.com) supplemented the notice. *Id.* ¶ 35.

CONCLUSIONS OF LAW

I. THIS COURT HAS THE CONSTITUTIONAL POWER AND STATUTORY AUTHORITY TO ENFORCE THE MANVILLE CONFIRMATION ORDER AND PLAN

1. The scope of the bankruptcy clause, contained in article I, section 8 of the Constitution, is well-established. U.S. const. art. I, § 8. It overrides any state law that "frustrates the full effectiveness of federal law. . . ." *Perez v. Campbell,* 402 U.S. 637, 652, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (declaring ineffective as against a discharged debtor the provisions of state law that prohibited issuance of drivers license to one who had an unpaid automobile accident liability, as the state law frustrated a "fresh start"). Even earlier than *Perez,* the Supreme Court had ruled that private rights arising under state law were subject to the federal bankruptcy law. *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181, 188, 22 S.Ct. 857, 46 L.Ed. 1113 (1902) (right to enforce judgment on a note subject to discharge in bankruptcy).

2. Congress expressly provided this authority in numerous provisions of the Bankruptcy Code:

> Section 105(a) gives the bankruptcy courts broad powers to "issue any order, process or

> judgment that is necessary or appropriate to carry out the provisions of" Chapter 11. 11 U.S.C. § 105(a).
>
> Section 1141(a) provides that "the provisions of a confirmed plan bind . . . any creditor. . . ."11 U.S.C. § 1141(a).
>
> Section 1142(b) states that "[t]he court may direct the debtor *and any other necessary party* to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, *that is necessary for the consummation of the plan.*" 11 U.S.C. § 1142(b) (emphasis added).

3. It is well-settled that Section 1142(b), in particular, vests the Court with authority to oversee implementation of the plan and retain jurisdiction for acts necessary for the consummation of the plan. *In re Chateaugey Corp.*, 201 B.R. 48, 66 (Bankr.S.D.N.Y.1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y.1997) ("The clear intent of Section 1142(b) of the Bankruptcy Code is to assure that the terms and provisions of a confirmed chapter 11 plan are carried out until the plan is completed and the final decree is entered closing the case."); *In re Terracor*, 86 B.R. 671, 676 (D.Utah 1988) (same); *In re Sugarhouse Realty, Inc.*, 192 B.R. 355, 368 (E.D.Pa.1996) ("Section 1142 of the Bankruptcy Code grants the court broad jurisdiction to secure implementation of the plan and to enter orders to effectuate the

plan.") (affirming bankruptcy court order granting party-in-interest's motion to compel purchaser to close under agreement of sale where Confirmation Order contained specific language directing parties to consummate transaction); *see also In re NTG Indus., Inc.*, 118 B.R. 606, 611 (Bankr.N.D.Ill.1990) ("[S]ection 1142(b) provides the authority for the Court to direct any necessary party to perform any other act that is necessary for the consummation of the plan[.]").

4. Even more fundamentally, bankruptcy courts—as courts of record created by Congress—"have inherent or ancillary jurisdiction to interpret and enforce their own orders. . . ." *Chateaugay*, 201 B.R. at 62 (" 'Bankruptcy Courts must have the ability to enforce prior orders and 'secure or preserve the fruits and advantages of a judgment or decree rendered therein'. . . The proceeding being ancillary and dependent, the jurisdiction of the Court follows that of the original cause . . .' "); *see also U.S. v. Local 39, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir.1995) ("an order of the court . . . *by its very nature* [ ] vests the court with equitable discretion to enforce the obligations imposed on the parties.") (emphasis added).

5. Consistent with the constitutional power and the statutory authority of this Court, this Court specifically retained jurisdiction to resolve disputes such as these. Paragraph 10.1 of the Plan provides for the retention of jurisdiction by this Court, *inter alia*, "[t]o determine any and all disputes arising under . . . the Settlement Agreements . . . ; [t]o enforce all orders, judgments,

injunctions and rulings entered in connection with the Cases; and [t]o enter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan." Ostrager Aff., Ex. H at ¶ 10.1(B), (K)(L). The Confirmation Order provides that the Court retains jurisdiction, *inter alia*, "to determine any and all disputes arising under the Plan . . . and the Settlement Agreements; . . . [t]o enforce all orders, judgments, injunctions and rulings entered in connection with the Cases; and [e]nter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan." Ostrager Aff., Ex. F at Decretal ¶ 28(a), (j), (k).

6. This Court has, as it has previously held, jurisdiction to enforce the Manville Confirmation Order and Plan pursuant to the jurisdiction retention provisions contained therein, the authority conferred by Sections 105(a), 1141(a) and 1142(b) of the Bankruptcy Code, and the Court's inherent power to interpret and enforce its own orders. *In re Johns-Manville Corp.*, 97 B.R. 174, 181 (Bankr.S.D.N.Y.1989) (Court "has continuing jurisdiction to enjoin non-bankruptcy suits that impair or violate the provisions of the Plan"). As Judge Lynch recently held in an appeal from these very proceedings, the claim that this Court lacks jurisdiction to remedy violations of its prior orders is "completely without merit." *In re Johns-Manville Corp.*, No. 03 Civ. 7173, 2004 WL 385118, at *2 (S.D.N.Y. Mar.2, 2004) (dismissing appeal from this Court's TRO because, *inter alia*, "[appellant's] challenge to the

bankruptcy court's jurisdiction is completely without merit and does not present substantial ground for difference of opinion").

7. "[T]he bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders in aid of their proper execution." *In re Johns-Manville Corp.*, 97 B.R. at 180; *accord In re Continental Airlines, Inc.*, 236 B.R. 318, 325-26 (Bankr.D.Del.1999) (bankruptcy court has jurisdiction to enforce confirmation order and determine whether plan barred separate court action), *aff'd*, 2000 WL 1425751 (D.Del. Sept.12, 2000), *aff'd*, 279 F.3d 226 (3d Cir.2002); *In re Texaco Inc.*, 182 B.R. 937, 944 (Bankr.S.D.N.Y. 1995) ("[T]he express language of the Bankruptcy Code, the decided cases . . . , the express provisions of the Texaco Plan and sound considerations of public policy compel the conclusion that a bankruptcy court has subject matter jurisdiction to enforce and interpret its own orders.").

8. The objectors' repeated invocation of cases such as *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379-384 (3d Cir.2002), *cert. denied sub nom. DaimlerChrysler Corp. v. Official Comm. of Asbestos Claimants*, 537 U.S. 1148, 123 S.Ct. 884, 154 L.Ed.2d 851 (2003), and *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), for the proposition that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor," *id.*, are beside the point and without merit. In this proceeding, the Court is enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction. There is no question that this

Court had jurisdiction over the Confirmation Order. 28 U.S.C. §§ 1334(b); 157(b)(2)(L) ("Confirmation of Plans"). This Court's conclusion that claims "based upon, arising out of, or related to" the Travelers/Manville relationship would adversely affect the Manville estate during reorganization was unanimously and conclusively determined to be a sufficient nexus for the channeling injunction the Second Circuit:

> [A]uthority for the injunction is to be found in section 105(a) of the Bankruptcy Code, which permits the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This provision has been construed liberally to enjoin suits that might impede the reorganization process. *In this case, the Bankruptcy Court found as a fact that to permit actions against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization.*

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93-94 (2d Cir.1988) (citations omitted).

9. In short, the Second Circuit has already considered and rejected a claim that the provisions in the Confirmation Order and Insurance Settlement Order incorporated therein protecting Travelers from claims "based upon, arising out of, or related to" the policies exceeded this Court's jurisdiction. *Id.* at 93-94. It necessarily follows that the Court has the power to interpret and enforce compliance with those Orders. Such power is inherent in the nature of the original

injunctions—which, by their terms, remain effective in perpetuity—and the very nature of this Court.

II. ALL PARTIES HAVE BEEN GIVEN THE REQUISITE NOTICE AND OPPORTUNITY TO BE HEARD IN THESE PROCEEDINGS

A. Notice Of The Statutory Proceedings Was Sufficient

10. As demonstrated by Findings of Fact ¶¶ 106 to 115 *supra*, the Statutory Direct Action Settlement notice program was reasonably calculated under all the circumstances to apprise the affected individuals of the proceedings and actions taken involving their interests, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), such program did in fact apprise the overwhelming majority of potentially affected claimants and far exceeded the minimum notice required. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("For creditors who are not 'reasonably ascertainable,' publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims.").

B. Notice Of The Common Law Proceedings Was Sufficient

11. As demonstrated by Findings of Fact ¶¶ 116 to 121 *supra*, the Common Law Direct Action Settlement notice program was also sufficient. The Court concludes that mailing direct notice via U.S. Mail to 4,197 law firms and 663,694 potentially affected claimants, as well as undertaking an extensive print media and internet campaign reaching nearly 50% of U.S. households, met and exceeded the requirements of due process.

12. The Court's conclusion in this regard is buttressed by the results of the notice campaign, including over 26,000 calls fielded by the toll-free number identified in the mailings and newspaper advertisements; nearly 20,000 requests for information packets; 8,000 website visits and almost 4,000 users registered to download documents. These results simply speak for themselves.

C. Notice of The Hawaii Proceedings Was Sufficient

13. As with the statutory notice program, the fact that all but 42 potentially affected claimants received notice directly by their counsel (and those 42 individuals were mailed packets) compels the conclusion that the requirements of due process have been met and exceeded. This conclusion is only amplified by the additional efforts undertaken: extensive newspaper campaign, toll-free call center and internet site.

D. Use Of A Bifurcated Settlement Approval Process Did Not Deprive Any Person Of Proper Notice And Is Fully Consistent With Second Circuit Law

14. Because the eligibility criteria and fund distribution procedures have not yet been established for the Common Law Direct Action Settlement, certain objectors contend they are deprived of appropriate notice of these proceedings. The Court concludes that these objections have no support in applicable Second Circuit law because formation of a distribution plan is not a prerequisite to approval of a settlement as a whole. *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381,* 818 F.2d 145, 170 (2d Cir.1987) ("[Developing distribution procedures] is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished."); *Nellis v. Shugrue,* 165 B.R. 115, 126 (S.D.N.Y.1994) ("Approval of a settlement can predate the determination of individual awards under the distribution plan."); *see also Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1153 (8th Cir.1999) (settlement notice need not contain formula for calculating individual awards; mailed notice was adequate where it "provided a reasonable summary of the stakes of the litigation, and class members could easily acquire more detailed information, including data on potential individual awards, through the

telephone number that was provided"); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 149-51 (E.D.N.Y.2000), *subsequent proceeding at* 2000 WL 33241660 (E.D.N.Y. Nov.22, 2000), *aff'd*, 14 Fed. Appx. 132 (2d Cir.2001); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y.1998), *subsequent proceeding at* 2000 WL 37992 (S.D.N.Y. Jan.18, 2000); *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 922 (S.D.N.Y.1991), *aff'd*, 960 F.2d 285 (2d Cir.1992).

15. The Court heard testimony from Don Ward at the July 6 hearing and, after cross-examination, tentatively approved the motion to appoint Mr. Ward as the common law claims administrator. Fund Distribution Procedures will be developed with the assistance of the claims administrator with input from all interested parties, and will be submitted to the Court for final approval.

16. Thus, inasmuch as the Common Law Settlement Agreement appropriately provides for "ultimate resolution of the distribution scheme by an outside neutral party," *Nellis*, 165 B.R. at 126, and because the Second Circuit has specifically sanctioned the use of a bifurcated process in which a settlement as a whole is evaluated prior to the adoption and evaluation of distribution procedures, and because the Common Law Direct Action Settlement Agreement contemplates this Court's approval of the final distribution scheme on notice to all parties, the Court concludes that the objections to this bifurcated process are not well-taken.

III. THE DIRECT ACTION CLAIMS VIOLATE THE CONFIRMATION ORDER AND THE INSURANCE SETTLEMENT ORDER CONTAINED THEREIN

A. There Is No Evidence That The Direct Action Claims Do Not Relate To Manville

17. When Travelers first sought this Court's protection in the summer of 2002, the plaintiffs in both the Statutory and Common Law Direct Action Lawsuits denied that their claims fell within the scope of this Court's orders. Two years, countless submissions and a full evidentiary hearing later, these objections have withered away and the evidence on the record and before this Court conclusively establishes that the direct action claims against Travelers are inextricably intertwined with Travelers long relationship as Manville's insurer.

18. On this record, no evidence has been presented—much less credibly proved—that the Direct Action Claims do not relate to Manville.

B. The Meaning And Scope Of The Court's Orders

19. In the final analysis, the relevant inquiry —in the 1980s, in 2002 and today—is the scope of the relief this Court intended to provide to Travelers when it entered the Confirmation Order and the Insurance Settlement Order incorporated therein.[6] The Direct Action Claims, though not

[6] Any purported arguments based on statements of the parties during the settlement drafting process or otherwise

totally unheard of in the mid-1980s, were certainly not as prevalent as they are today. This Court did not intend the scope of finality of the Orders to be less than 100% of everything Manville-related. As set forth below, this Court clarifies that the Direct Action Claims that are the subject of these proceedings are within the scope of the Confirmation Order's and the Insurance Settlement Order's prohibitions, and are—and always have been—permanently barred.

20. The Court has administered the Manville bankruptcy since it was filed on August 26, 1982, presided over confirmation of the Manville Plan, and issued the Confirmation Order. As set forth above, the key to confirmation of the Manville Plan was the creation of a mechanism through which asbestos victims could be compensated with funds contributed by Settling Insurers. The Court understood that insurers would not contribute funds without receiving assurance that any liabilities arising from or relating to their

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are thus completely beside the point. *See, e.g., Matter of Mem'l Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300 (7th Cir.1988) (court rulings are "public act[s] of the government"—not "private agreement[s]" among parties); *U.S. v. Swift & Co.*, 286 U.S. 106, 115, 52 S.Ct. 460, 76 L.Ed. 999 (1932) ("We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380-81, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604-05, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) ("court-ordered consent decrees create [a] material alteration of the legal relationship of the parties [with a] necessary judicial *imprimatur* on the change.").

insurance relationships with Manville would be fully and finally resolved. The Court also understood that in order to facilitate the insurance settlements, the Confirmation Order needed to contain a centralization of disputes provision to ensure that Settling Insurers would not be required to expend resources litigating the scope of the Court's Orders across the country.

C. The Relevant Orders

21. In order to ensure finality, the Confirmation Order permanently enjoins "all Persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . [,]" Ostrager Aff., Ex. F at Decretal ¶ 29 (emphasis added).

22. Similarly, again in order to ensure finality, the Insurance Settlement Order specifically prohibits every claim at issue here with its clear command that "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group. . . ." Ostrager Aff., Ex. D at 23.2(F); *accord id.* at 1.2(D), 2.2(D). As set out above, "Policy Claims" are defined as broadly as possible to include

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or

> not presently known) which have been, or *could have been, or might be, asserted* by any Person against any or all members of the JM Group or against any or all members of *the Settling Insurer Group based upon, arising out of or relating to the Policies.*

Ostrager Aff., Ex. D at 23.1 (emphasis added).

23. The Court's repeated use of the terms "arising out of" and "related to" were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate. "In many areas of law . . . the use of 'arising out of' language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading." *Nycal Corp. v. Inoco PLC*, No. 98-7058, 1998 WL 870192, at *2 (2d Cir. Dec.9, 1998); *see also Richards v. Princeton Ins. Co.*, 178 F.Supp.2d 386, 392-93 (S.D.N.Y.2001) (in the context of insurance policies "[t]he term 'arising out of' is to be interpreted in a broad and comprehensive sense to mean originating from or growing out of . . ."); *U.S. Underwriters Ins. Co. v. Zeugma Corp.*, No. 97 Civ. 8031(SS), 1998 WL 633679, at *3 (S.D.N.Y. Sept.15, 1998) ("When used in a policy exclusion the words 'arising out of' are deemed to be 'broad, general, comprehensive terms ordinarily understood to mean originating from, incident to, or having connection with' ").

24. The phrase "related to" is even "*broader* in scope" than "arising out of," does not require a causal relation, has been found to be synonymous

with phrases such as "in connection with" "associated with" "with reference to" and "with respect to," and is not ambiguous in spite of its breadth. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir.2001); *see also Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir.2000) (finding arbitration clause containing "arising out of or relating to" language to be "classically broad" and "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability"); *Vt. Pure Holdings, Ltd. v. Descartes Systs. Group, Inc.*, 140 F.Supp.2d 331, 334-35 (D.Vt.2001) ("The Second Circuit has . . . held that the ordinary meaning of the term 'related to' was clear, unambiguous, and quite broad . . . and has been defined simply as 'connected by reason of an established or discoverable relation' ").

D. The Direct Action Claims Violate The Insurance Settlement Order Incorporated In The Confirmation Order

25. The evidence in this proceeding establishes that the gravamen of Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers insurance relationship with Manville. Thus, claims against Travelers based on such actions or omissions necessarily "arise out of" and "related to" the Policies. As summarized by Professor Priest, the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville. 7/6/04 Tr. at 33.

26. Under well-settled law, an insurer's participation in the investigation and defense of

claims against a policyholder is firmly rooted in the insurance policies, as the duty to defend and pay covered losses of a policyholder in litigation is a central element of liability insurance. *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 509 (N.Y.1993) ("[t]hough policy coverage is often denominated as 'liability insurance,' where the insurer has made promises to defend 'it is clear that [the coverage] is, in fact, 'litigation insurance' as well") (citations omitted); *Truax v. State Farm Ins. Cos.*, 101 Misc.2d 1031, 422 N.Y.S.2d 592, 594 (N.Y.Sup.Ct.1979). Indeed, "the duty to defend is broader than the duty to indemnify." *Recant v. Harwood*, 222 A.D.2d 372, 635 N.Y.S.2d 231, 232 (N.Y.App. Div. 1st Dep't 1995) (citing *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148, 154, 77 N.E.2d 131 (1948)); *see also Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873, 320 N.E.2d 619, 621 (N.Y.1974) ("An insurer's obligation to furnish its insured with a defense is heavy indeed, and, of course, broader than its duty to pay.").

27. The obligation to defend arises out of the insurance policy, and its scope is determined based on the policy's provisions. *Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 N.Y.2d 61, 571 N.Y.S.2d 672, 575 N.E.2d 90, 93 (N.Y.1991) ("the duty to defend derives, in the first instance . . . from the insurer's own contract with the insured . . . the contract itself must always remain a primary point of reference"); *Int'l Paper Co.*, 361 N.Y.S.2d 873, 320 N.E.2d at 621 ("An insured's right to be accorded legal representation is a con-

tractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured.").

28. The duties Travelers owed to Manville are not in dispute:

> *Defense, Settlement, Supplementary Payments. As respects such insurance as is afforded by the other terms of this policy the company shall*
>
> (a) *defend* in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such *investigation*, negotiation and settlement of any claim or suit as may be deemed expedient by the company.

Munroe Decl. Tab A (Ex. 13 at 2, Insuring Agreements ¶ II) (emphasis added).

29. The duty to defend its insured under a policy (including investigations made by the insurer in connection therewith) consists of a duty to defend *in confidence*, subject to all of the protections of privilege and confidentiality that the adversarial system affords all parties in litigation. *Am. Special Risk Ins. Co. v. Greyhound Dial Corp.*, No. 90 Civ.2066(RPP), 1995 WL 442151, at *2 (S.D.N.Y. Jul.26, 1995) (holding communications between insurer and insured after a claim is filed are privileged); *Recant*, 635 N.Y.S.2d at 232-33 (finding accident reports prepared by

insured for insurer, as well as most liability insurer work product conducted after accident, to be privileged); *see also Harris v. Processed Wood, Inc.*, 455 N.Y.S.2d 220, 222 (N.Y.App. Div. 4th Dep't 1982) (holding statements by policyholder to insurer made in connection with the defense and settlement of claim are privileged); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (N.Y.App. Div.2d Dep't 1965) (finding statements made by insured to liability insurer, "a defendant in a very real sense," is privileged as preparation for trial whether or not action has commenced). In accordance with these basic principles of insurance law, Travelers defended asbestos cases against Manville pursuant to the Policies and maintained privileged and confidential both Manville's disclosures and Travelers' own defense-related investigations.

E. The Direct Action Claims Also Violate The Other Provisions Confirmation Order

30. If the Direct Action Claimants had been compensated 100% by either Manville or the Manville Trust, they would have no economic basis to bring claims against Travelers for its Manville-related conduct: all such injuries would have been paid 100%.

31. It is only because they feel they should have been able to negotiate a larger settlement with Travelers acting on behalf of Manville, or that they should have received a larger award from the Manville Trust, that the Direct Action Claims are trying to recover more. But it was

precisely the possibility of less than 100% compensation from the Trust that led the Court to prohibit any direct or indirect efforts to make up that shortfall from the Settling Insurers on "any theory of law." Ostrager Aff., Ex. H at Ex. A to Plan.

32. The Direct Action Claims fall within the Confirmation Order's permanent injunction against all persons from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation. . . ." Ostrager Aff., Ex. F at Decretal ¶ 29 (emphasis added).

F. Any Claims For "Contribution" Or "Indemnity" By Other Insurers Would Violate The Confirmation Order

33. A condition of each of the Settlement Agreements is that this Court issue a ruling clarifying that the injunctions contained in the Confirmation Order and the Insurance Settlement Order apply to contribution or indemnity claims against Travelers arising from any enjoined direct action claims. Several insurance companies named as defendants in certain of the Direct Action Claims argue that Court is unauthorized to bar the contribution or indemnity claims they may have against Travelers.

i. Contribution Or Indemnity Claims By Non-Settling Defendants In Direct Action Claims Would Violate The Confirmation Order And The Insurance Settlement Order Contained Therein

34. The Confirmation Order permanently enjoins all persons:

> from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . (a) [c]ommencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding . . . against or affecting . . . any of the Settling Insurance Companies. . . .

Ostrager Aff., Ex. F at Decretal ¶ 29. In addition, the Insurance Settlement Order specifically prohibits contribution and indemnity claims, providing that "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding *of any type or nature* for Policy Claims against any or all members of the Settling Insurer Group." Ostrager Aff., Ex. D at 23.2(F) (emphasis added); *accord id.* at 1.2(D), 2.2, 256 N.Y.S.2d 358(D). "Policy Claims" are defined broadly as "any and all claims . . . which have been, or could have been, or might be, asserted by any Person . . . against any or all members of the Settling Insurer Group

based upon, arising out of or relating to the Policies." *Id.* at ¶ 23.1.

35. The Court's Orders apply to "all Persons" without regard to whether the "Person" asserting the claim is an individual plaintiff attempting to hold Travelers liable for Manville-related conduct or another insurance company attempting to do the same under the guise of claims for "contribution" or "indemnity"—both of which qualify as "claims . . . which have been, or could have been, or might be, asserted by any Person . . . against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies."Ostrager Aff., Ex. D at ¶ 23.1.

ii. The Judgment Reduction Provisions Fully Protect Non-Settling Insurer Defendants

36. Moreover, the Proposed Order contains a judgment reduction provision that enforces the Insurance Settlement Order and Confirmation Order by clarifying that Policy Claims arising from Travelers alleged conduct may not be surreptitiously collected by plaintiffs from other insurers. *Cf. In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1363 (2d Cir.1991) (noting that judgment reduction provisions effectuate the finality of settlements—such as the Travelers/Manville settlement—by making sure that settling defendants are not "derivatively exposed to claims by [ ] plaintiffs in the form of claims for indemnity or contribution by the nonsettling defendants

against whom the plaintiffs may obtain judgments.").

37. The judgment reduction provides:

> Any judgment obtained against a non-settling defendant shall be reduced by the amount, percentage or share attributable to the settling defendant whether by contribution, indemnity or otherwise under applicable state law. The non-settling defendant subject to a damages award shall establish any right or claim for indemnification or contribution and the amount, percentage or share attributable to the settling defendant in the case in which such award is made.

38. In addition to properly enforcing the Confirmation Order and the Insurance Settlement Order by prohibiting indirect collection of Policy Claims from third parties, the judgment reduction provision protects the interests of non-settling defendants in the direct action claims so completely as to render their objections to the settlements moot. *Ivan F. Boesky*, 948 F.2d at 1362-69 (recognizing enforceability of judgment reduction provisions); *Drexel Burnham Lambert Group*, 130 B.R. at 926 (same); *Eichenholtz v. Brennan*, 52 F.3d 478, 486-87 (3d Cir.1995) (same); *In re Munford, Inc.*, 97 F.3d 449 (11th Cir.1996) (same, in the bankruptcy context).

G. The "Notice Pleading" Suits And Future Actions Attempting To Hold Travelers Liable For The Sins Of Manville Are Properly Barred Under The Proposed Order

39. While many of the complaints placed in evidence before the Court are replete with detailed allegations regarding Travelers insurance relationship with Manville, others filed in so-called notice pleading jurisdictions provide little, if any, factual underpinning for their broad, conclusory claims against Travelers. It is reasonable to conclude that future plaintiffs will attempt to circumvent the Court's orders with similar notice pleading. *See infra* ¶¶ 89-92 (discussing the creative effort of some plaintiffs to avoid the Court's TRO by simply deleting the word "Manville").

40. As Professor Priest cogently noted, such attempts will likely be bound to run afoul of this Court's orders:

> Given the significance of Manville in the mining, manufacture and distribution of asbestos and asbestos-containing products, its dominant role in asbestos litigation, and Travelers unique role as Manville's primary insurer and obligations under the Manville policies, it is difficult to imagine how a plaintiff would attempt to hold Travelers liable for acts or omissions relating to the hazards of asbestos in these statutory direct action claims without relying on information Travelers obtained based on its obligations under the Manville policies.

Priest Decl. ¶ 46; *see also id.* ¶ 54 ("Likewise, in my opinion, any other claim against Travelers based on Travelers knowledge or alleged knowledge concerning the hazards of asbestos . . . would undoubtedly arise from or relate to Travelers insurance relationship with Manville and its obligations under Travelers policies."); 7/6/04 Tr. at 33 (the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville) (testimony of Prof. Priest). This evidence is unrebutted.

41. Courts are not powerless to deal with those who would elevate form over substance. Indeed, courts have "broad discretionary power . . . to fashion equitable remedies which are a special blend of what is necessary, what is fair, and what is workable." *Class v. Norton,* 376 F.Supp. 496, 501 (D.Conn.), *aff'd in part, rev'd in part on other grounds,*505 F.2d 123 (2d Cir.1974) (quotations omitted). "Once a right and a violation have been shown, the scope of [the] court's equitable powers to remedy past wrongs is *broad,* for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added); *accord EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers,* 925 F.2d 588, 593 (2d Cir.1991) (for courts of equity, "judicial discretion in flexing its supervisory and enforcement muscles is broad.").

42. The evidence adduced in this proceeding shows that the Court's Orders have been repeatedly violated by creative plaintiffs. In view of

these violations, the Court has the power and inclination to enter the so-called "gatekeeping" provision that the parties have proposed, which reasonably and appropriately vests the initial determination regarding whether an asbestos suit against Travelers will violate the Court's orders. This provision is congruent, proportional and wholly justified. *Berger v. Heckler*, 771 F.2d 1556, 1558, 1569 (2d Cir.1985) (party's "demonstrated noncompliance with the terms of the [court's order]" warranted court's taking "such steps as are appropriate given the resistance of the noncompliant party") (citations omitted).

43. Moreover, the gatekeeping provision is fully justified by the Court's duty to look to the body of *facts* alleged—and not to the labels or legal theories—to ascertain whether a given claim has been settled, dismissed or enjoined, *Antonsen v. Ward*, 943 F.2d 198, 201 (2d Cir.1991); *Berlitz Sch. of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir.1980) ("whatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata"); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.1977) ("For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.") (citation omitted), as well as the Court's duty to address the litigation realities that are now before it—especially in the context of the attempted resuscitation of settled, dismissed and enjoined causes of action. *Levin v. Interconti-*

nental Cas. Ins. Co., 95 N.Y.2d 523, 719 N.Y.S.2d 634, 742 N.E.2d 109, 111 (N.Y.2000) (court is "guided not by nomenclature but by the realities of litigation"); *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 531 N.Y.S.2d 876, 527 N.E.2d 754, 756 (N.Y.1988) (considering "realities of litigation" in deciding whether claims were enjoined); *see also In re Cohen*, 92 B.R. 54, 66 (Bankr.S.D.N.Y.1988) (same). It is the factual "gravamen" of the complaint, and not the various artistries and illusions of minimal notice pleading, which guide disposition here. *Monfort v. Larson*, 257 A.D.2d 261, 693 N.Y.S.2d 286, 289 (N.Y.App. Div.3d Dep't 1999) ("Regardless of the language used in the complaint, the gravamen of plaintiffs' tort causes of action [are preempted]."); *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F.Supp.2d 540, 551 (S.D.N.Y.2000) (looking to the "gravamen of the complaint" to determine the nature of the action).

44. Consequently, the Court concludes that Travelers has clearly shown entitlement to both the gatekeeping provision in the Proposed Order and a clarification that the commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn,

breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

IV. GRANTING THE RELIEF REQUESTED WILL NOT HARM THE MANVILLE TRUST

45. Approval of these Settlement Agreements will provide a significant new source of funds to asbestos claimants. Critically, the new funds are wholly accretive.

46. Under the express terms of the Insurance Settlement Order incorporated into the Confirmation Order, all claims that are enjoined and released are also channeled to the Trust. *See* Ostrager Aff., Ex. D at 1.2(B)(D), 2.2(B)(D), 23.2(D)(F).

47. Accordingly, the Court-approved Trust Distribution Procedures were and remain designed to fully compensate Trust claimants for all liabilities channeled to the Trust—whether such liability arises from actions by Manville or by the Settling Insurers.

48. Trust settlement values already compensate claimants for any and all liabilities channeled to the Trust.

49. To confirm this result and further guard against any hypothetical danger to the Trust, the Proposed Order clearly provides that it shall not increase the liabilities or obligations of the Manville Trust.

50. Such provision will be both descriptive and prescriptive: it accurately reflects the Court's intent and it affirmatively orders that no additional liabilities will be channeled to the Trust that have not already been released and channeled for nearly twenty years.

V. THE SETTLEMENT AGREEMENTS ARE FAIR AND EQUITABLE

51. The standard for approving a settlement agreement is whether the compromise is "fair and equitable." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

52. A settlement's fairness and reasonableness is determined with reference to a number of factors, including the balance between the likelihood of success compared to the present and future benefits offered by the settlement; the prospect of complex and protracted litigation if settlement is not approved; the competency and experience of counsel who support the settlement; the relative benefits to be received the settling parties; the nature and breadth of releases to be obtained; and the extent to which settlement is the product of arm's length bargaining.

Nellis v. Shugrue, 165 B.R. 115, 122 (S.D.N.Y. 1994).

53. The inquiry is whether the settlement falls below the lowest point in the range of reasonableness. *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.1983).

54. Each of these settlements is advantageous from the plaintiffs' perspective, as they provide Manville claimants with a significant new source of asbestos compensation. Tellingly, after noticing the proposed settlements to millions of individuals, not a single particularized objection was lodged concerning whether the amount of the settlements (including the attorney's fees provided pursuant to the settlement agreements) were fair and reasonable.

55. Further, the agreements were "the product of good faith, arms-length negotiations" among the parties. Mediator's Final Report ¶ 4.

CONCLUSION

WHEREFORE, it is hereby ordered, adjudged and decreed that Travelers Motions to Approve: (i) Settlement Of Statutory Direct Action Claims And Entry Of Clarifying Order, (ii) Settlement Of Common Law Direct Action Claims And Entry Of Clarifying Order, and (iii) Hawaii Direct Action Settlement Agreement, are GRANTED and the settlements are APPROVED, and the Clarifying Order shall enter.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued October 30, 1987
Decided January 19, 1988

Nos. 402, 403,
Dockets 87-5030, 87-5038

In re JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

MACARTHUR COMPANY and
WESTERN MACARTHUR COMPANY,

Appellants,

—v.—

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION, AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE

PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, MANVILLE CANADA SERVICE INC., and SUNBELT CONTRACTORS, INC.,

Appellees.

Debtor moved for approval of proposed settlement with products liability insurers and for order enjoining all future suits against insurers related to settled policies. The United States Bankruptcy Court for the Southern District of New York, Burton R. Lifland, Chief Judge, entered order approving settlements and enjoining suits, and appeal was taken. The District Court, Whitman Knapp, J., affirmed. Appeal was taken. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) any rights that distributor might have in debtor's products liability policies, pursuant to vendor endorsements contained therein, were derivative of and inseparable from debtor's own rights, so as to fall within Bankruptcy Court's jurisdiction over property of debtor's estate, and (2) Bankruptcy Court did not exceed its authority when, in approving settlement of debtor's claims against products liability insurers, it enjoined suits against insurers.

Affirmed.

John H. Faricy, Jr., Minneapolis, Minn. (Pustorino, Pederson, Tilton, & Parrington, Minneapolis, Minn., James J. Higgins, Boyar, Hig-

gins & Hayden, New York City, on the brief), for appellants.

Lowell Gordon Harriss, New York City (Laureen F. Bedell, Gregor Baer, Davis Polk & Wardwell, Herbert Stephen Edelman, Andrew A. Kress, Levin & Weintraub & Crames, New York City, on the brief), for appellees.

Before

NEWMAN, WINTER and MINER,
Circuit Judges.

JON O. NEWMAN, Circuit Judge:

MacArthur Company and Western MacArthur Company (collectively "MacArthur") appeal from an order of the District Court for the Southern District of New York (Whitman Knapp, Judge) affirming orders of the Bankruptcy Court (Burton R. Lifland, Chief Judge) entered in connection with the Chapter 11 proceeding of the Johns-Manville Corporation ("Manville"). The orders of the Bankruptcy Court approved settlements between Manville and various of its insurance carriers and enjoined all suits against the insurers related to the settled policies. MacArthur, a distributor of Manville's asbestos, claims to be a coinsured under the settled policies by virtue of "vendor endorsements" contained in the policies. It argues that the Bankruptcy Court was without

jurisdiction or authority to issue the injunctive orders, which prevent it from suing the insurers. We conclude that the Bankruptcy Court had jurisdiction over the insurance policies as property of the debtor's estate. Moreover, the court had authority to issue the injunctive orders pursuant to its power to dispose of a debtor's property free and clear of third-party interests and to channel such interests to the proceeds of the disposition. The order of the District Court is affirmed.

Background

On August 26, 1982, Johns-Manville Corporation filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing was largely in response to Manville's potential liability to persons with latent asbestos-related disease caused by Manville's asbestos products. As has been explained during earlier proceedings in the Manville reorganization, Manville faced the possibility of suits by tens of thousands of as yet unknown asbestos victims, amounting to a potential liability of more than two billion dollars. *See Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420 (Bankr.S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984); *GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 B.R. 405 (Bankr.S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984).

At the time of its Chapter 11 filing, Manville was engaged in extensive litigation with its insurance carriers concerning its coverage for

asbestos-related liabilities. In order to avoid the uncertainty of the insurance litigation and to provide funding for its plan of reorganization, Manville endeavored to settle its insurance claims. Between 1984 and 1986, the insurers agreed to settle with Manville for approximately $770 million. The settlements provided that, in exchange for cash payments, the insurers would be relieved of all obligations related to the disputed policies and the insurers would be protected from claims based on such obligations by injunctive orders of the Bankruptcy Court. The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal. Since the insurance settlements are a cornerstone of Manville's proposed plan of reorganization, *see Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 33 B.R. 254, 267 (Bankr.S.D.N.Y. 1983), the Bankruptcy Court's orders are a critical part of the entire reorganization.

MacArthur is a distributor of Manville's asbestos products. It claims to be a coinsured under some of Manville's insurance policies pursuant to "vendor endorsements" contained in the policies. The vendor endorsements entitle distributors to insurance coverage for liability resulting from their sale of Manville's products. The endorsements are subject to the payment limits and other restrictions of the underlying policies; thus, if the product liability aggregate limits in the underlying Manville policies have been exhausted, the insurer has no independent obligation to pay distributors on product liability

claims. It is disputed whether Manville's policy limits have been exhausted.

MacArthur objected to the Bankruptcy Court's approval of the insurance settlements on the ground that the proposed injunctions would impair its rights under the vendor endorsements.[1] MacArthur argued that it had recently been sued because of its sale of Manville's asbestos, that it was entitled to coverage from the settling insurers, and that its contractual rights could not lawfully be extinguished by the Bankruptcy Court's injunctive orders. MacArthur suggested that the Bankruptcy Court's orders would be permissible only if the Court extended the protection of the injunction to MacArthur, that is, if asbestos-related suits were barred against MacArthur as well as against the settling insurers. The Bankruptcy Judge dismissed MacArthur's objections from the bench, reasoning that its "interest in the policies is highly speculative" and that any claim it had, based on Manville's insurance, could be asserted in the Bankruptcy Court. By orders dated December 18, 1986, and January 14, 1987, the Bankruptcy Court approved the insurance settlements and enjoined all suits against the insurers "based upon, arising out of, or related to the [settled] policies." The Bankruptcy Court's orders further provided that the settlement fund was subject to the continuing jurisdiction of the Bankruptcy Court and that law suits subject to the injunction "are transferred, and shall attach, solely to the Settlement Fund." On July 15, 1987, the District

[1] Neither MacArthur nor any other party has challenged the fairness of the $770 million settlement amount.

Court affirmed the orders of the Bankruptcy Court. This appeal followed.

Discussion

MacArthur's primary contention on appeal is that the Bankruptcy Court lacked jurisdiction and authority to enjoin suits against Manville's insurers. MacArthur argues that the injunctive orders constitute a *de facto* discharge in bankruptcy of non-debtor parties not entitled to the protection of Chapter 11. MacArthur insists that its interests in the vendor endorsements is a contractual right solely between it and the non-debtor insurance companies and is therefore beyond the reach of the Bankruptcy Court. The flaw in MacArthur's reasoning is that the injunctive orders do not offer the umbrella protection of a discharge in bankruptcy. Rather, they preclude only those suits against the settling insurers that arise out of or relate to Manville's insurance policies. Moreover, claims against the insurers based on Manville's policies are not extinguished; they are simply channeled away from the insurers and redirected at the proceeds of the settlement. The Bankruptcy Court properly issued the orders pursuant to its equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created.

It is well established that a bankruptcy court has jurisdiction over all of the property of the debtor's estate, wherever located. *See Straton v. New*, 283 U.S. 318, 320-21, 51 S.Ct. 465, 466, 75 L.Ed. 1060 (1931) (purpose of bankruptcy law is

"to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors"); *Loewi Realty Corp. v. Chanticleer Assoc., Ltd. (In re Chanticleer Assoc., Ltd.)*, 592 F.2d 70, 73-74 (2d Cir. 1979) (bankruptcy court's "power to preserve its jurisdiction by enjoining proceedings that would remove property from the bankrupt estate is fundamental"); 28 U.S.C.A. § 1334(d) (West Supp. 1987) (district court sitting in bankruptcy has jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"); 28 U.S.C. § 157(b)(2) (Supp. III 1985) ("core proceedings" in which bankruptcy judges may issue final orders include proceedings related to the property of the estate). The Bankruptcy Code broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982). This provision has been construed expansively: "The scope of this paragraph [section 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in Section 70a of the Bankruptcy Act." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9, 103 S.Ct. 2309, 2313 n. 9, 76 L.Ed.2d 515 (1983) (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5868). In *Whiting Pools*, the Supreme Court held that the property of the estate includes assets seized by a creditor prior to the filing of the bankruptcy petition. The

Court explained that "[b]oth the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate." 462 U.S. at 204, 103 S.Ct. at 2313; *accord Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.), supra*, 40 B.R. at 230.

Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction. During earlier proceedings in the present case, the Bankruptcy Court held that the automatic stay provision of the Code, 11 U.S.C. § 362(a) (1982 & Supp. IV 1986), which prevents suits against the debtor or his property after a petition is filed, authorized an injunction that barred claims by asbestos victims against Manville's insurers in jurisdictions allowing direct actions against the insurers. *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.), supra*, 26 B.R. at 435-36 (on rehearing), *aff'd*, 40 B.R. at 230-31. The Court found that Manville's insurance policies and their proceeds were "substantial property of the Manville estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments." 26 B.R. at 435. The Fifth Circuit has followed this analysis, enjoining suits against Manville's insurers in Louisiana, a state that permits direct actions. *See In re Davis*, 730 F.2d 176, 184 & n. 25 (5th Cir.1984). Other courts are in agreement. *E.g. A.H. Robbins Co. v. Piccinin (In re A.H. Robbins Co.)*, 788 F.2d 994, 1001-02

(4th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Pearl-Wick Corp. v. John Hancock Mutual Life Insurance Co. (In re Pearl-Wick Corp.)*, 15 B.R. 143, 148 (Bankr.S.D.N.Y. 1981), *aff'd*,26 B.R. 604 (S.D.N.Y.), *aff'd*, 697 F.2d 295 (2d Cir.1982); *In re Moskowitz*, 13 B.R. 357, 360 (Bankr.S.D.N.Y.1981); *Brenham v. Deerfield Organization, Inc. (In re Norman Industries)*, 1 B.R. 162, 166 (Bankr.W.D.La.1979).

MacArthur insists that while Manville's interests in the settled insurance policies may be subject to the jurisdiction of the Bankruptcy Court, those interests are separate and distinct from MacArthur's own contractual rights, which the Bankruptcy Court may not impair. MacArthur contends that because its own rights are separate from Manville's, its claims under the vendor endorsements are too remote from the Chapter 11 proceeding to permit the Bankruptcy Court to exercise jurisdiction. *See Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 83-87, 102 S.Ct. 2858, 2877-80, 73 L.Ed.2d 598 (1982); 1 King, *Collier on Bankruptcy* ¶ 3.01 at 3-29 (15th ed. 1987). MacArthur's position is unsupported in the record. The vendor endorsements cover only those liabilities resulting from the vendor's status as a distributor of Manville's products. The endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies. MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured. Such derivative rights are no different in this respect from those of the

asbestos victims who have already been barred from asserting direct actions against the insurers. *See In re Davis, supra.* MacArthur asserts contractual obligations whereas the direct action plaintiffs' claims sounded in tort; nevertheless, in both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. In both cases, plaintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets. *See In re Davis,* 730 F.2d at 183 (rejecting claim that direct actions against insurers have no reasonable nexus with bankruptcy proceedings).

Having properly exercised jurisdiction over the insurance policies, the Bankruptcy Court had the authority to approve the settlements and to channel claims arising under the policies to the proceeds of the settlement. In *Van Huffel v. Harkelrode,* 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256 (1931), the Supreme Court explained that even absent express statutory authority, the Bankruptcy Court had the inherent equitable power to sell a debtor's property and to transfer third-party interests to the proceeds of the sale. 284 U.S. at 227-28, 52 S.Ct. at 116. *See also Ray v. Norseworthy,* 90 U.S. (23 Wall.) 128, 134-35, 23 L.Ed. 116 (1874) (court may sell bankrupt's property encumbered by third-party claims as long as third parties retain their respective priorities in the proceeds of the sale); *Fierman v. Seward National Bank,* 37 F.2d 11, 13 (2d Cir.1930) ("When the bankrupt's property was sold free of liens, the liens upon the property became rights

against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was."); *In re Penn Central Transportation Co.*, 383 F.Supp. 1128, 1130 (E.D.Pa. 1974) (power of a reorganization court to transfer interests in debtor's property to the proceeds of a sale is well established). The Bankruptcy Code provides statutory authority for the channeling orders. 11 U.S.C. § 363(f) (1982 & Supp. IV 1986) permits, under certain circumstances, sales of property in the debtor's estate "free and clear of any interest in such property of an entity other than the estate." One of the circumstances permitting such sales is that the third-party interest be in *bona fide* dispute. 11 U.S.C. § 363(f)(4). In the present case, such a dispute exists because Manville claims that the product liability limits on the policies to which the vendor endorsements attach have been exhausted. The Bankruptcy Judge appears to have substantially accepted Manville's contention, as he found that MacArthur's interest in the settled policies was "highly speculative."

The injunctive orders issued by the Bankruptcy Court were necessary to effectuate the Court's channeling authority, that is, to make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund and could not be asserted directly against the insurers. The authority to issue the injunction is thus a corollary to the power to dispose of assets free and clear and to channel claims to the proceeds.

> The Bankruptcy Court, having jurisdiction over the property of the Bankrupt, and having jurisdiction to order the sale of the Bankrupt's property and to determine the nature, extent and validity of liens asserted against the proceeds, had jurisdiction to enjoin a lien-holder from attempting to assert his lien against property in the hands of a purchaser who has acquired from the Bankruptcy Court a title free and clear of liens and encumbrances.

Whitehead & Kales Co. v. Dempster (In re Wiltse Bros. Corp.), 361 F.2d 295, 299 (6th Cir.1966) (citing *Van Huffel v. Harkelrode, supra*). Additional authority for the injunction is to be found in section 105(a) of the Bankruptcy Code, which permits the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (Supp. IV 1986). This provision has been construed liberally to enjoin suits that might impede the reorganization process. *See Manville Corp. v. Equity Security Holders Committee (In re Johns-Manville Corp.)*, 801 F.2d 60, 64 (2d Cir.1986); *In re Davis, supra*, 730 F.2d at 183-84. In this case, the Bankruptcy Court found as a fact that to permit actions against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization. *Johns-Manville Corp. v. Asbestos Litigation Group, supra*, 26 B.R. at 435-36.

Admittedly, the insurance settlement and accompanying injunction in this case are not pre-

cisely the same as the traditional sale of real property free and clear of liens followed by a channeling of the liens to the proceeds of the sale. *E.g. Van Huffel v. Harkelrode, supra.* Here, the property of the estate at issue (insurance policies) was not technically "sold"; rather, Manville liquidated its interest via a voluntary settlement. Moreover, the claims on the property-MacArthur's interest under the vendor endorsements, or in the earlier stages of this litigation, health claimants' direct actions-are different from the liens on real property that are traditionally the subject of the bankruptcy court's equitable channeling power. *But cf. Forde v. Kee-Lox Manufacturing Co.*, 437 F.Supp. 631, 634-35 (W.D.N.Y.1977) (trustee permitted to sell debtor's estate free and clear of a civil rights claim), *aff'd on other grounds*, 584 F.2d 4 (2d Cir.1978); *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323, 329 (Bankr.W.D.Wash.1982) (same). Nevertheless, the underlying principle of preserving the debtor's estate for the creditors and funneling claims to one proceeding in the bankruptcy court remains the same. The principle is a fundamental part of the bankruptcy law. Particularly since the insurance settlement/injunction arrangement was essential in this case to a workable reorganization, it falls well within the bankruptcy court's equitable powers "which traditionally 'have been invoked to the end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done.'" *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir.1984) (quoting

Pepper v. Litton, 308 U.S. 295, 305, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939)).

MacArthur contends that the Bankruptcy Court's orders are unfair. MacArthur asserts that it has been forced to accept the burden of asbestos victims' suits without the protection of the insurance coverage to which it is entitled. Even if we assume that MacArthur could show that it has a valid claim against the insurers, MacArthur is not left without a remedy: It may proceed in the Bankruptcy Court against the $770 million settlement fund. It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition. *See Ray v. Norseworthy, supra,* 90 U.S. at 134-35; S.Rep. No. 989, 95th Cong., 2d Sess. 56 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5842 (committee report on 11 U.S.C. § 363(f)) ("Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."). In the present case, the injunctive orders of the Bankruptcy Court make clear that claims arising from the settled insurance policies attach to the settlement fund. It may well be that MacArthur would prefer to assert its interest in Manville's property in a proceeding other than that in the Bankruptcy Court, but such a result is not required by the bankruptcy law.

We have considered MacArthur's contention that it was denied due process of law because it received notice of the insurance settlements only

after the settlements had been negotiated. This contention is without merit because MacArthur and all other interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court. The notice of proposed settlements issued by the Bankruptcy Court met the requirements of due process. *See Handschu v. Special Services Division*, 787 F.2d 828, 832-33 (2d Cir.1986).

The decision of the District Court affirming the orders of the Bankruptcy Court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 86 Civ. 6124 (WK), 87 Civ. 0139 (WK),
87 Civ. 0699 (WK), 87 Civ. 0700 (WK),
87 Civ. 0701 (WK), 87 Civ. 0847 (WK)
and 87 Civ. 1283 (WK)

July 15, 1987

In re
JOHNS-MANVILLE CORP., *et al.*

The Bankruptcy Court, 68 B.R. 618, Burton R. Lifland, Chief Judge, entered order approving reorganization plan for Chapter 11 debtor, which was facing massive toxic tort liability arising out of asbestos-related health and property claims. Certain groups appealed. The District Court, Whitman Knapp, J., held that plan could be approved, notwithstanding objections by debtor's shareholders, debtor's coinsured, alliance of asbestos health claimants, and other companies with potential asbestos-related liability.

So ordered.

L. Gordon Harriss, Davis Polk & Wardwell, New York City, Michael J. Crames, Levin & Weintraud & Crames, New York City, for debtors.

David H. Remes, Covington & Burling, Washington, D.C., for Armstrong World Indust.

Richard Lieb, Kronish Lieb Weiner & Hellman, New York City, for Certain Holders of Common Stock.

Elihu Inselbuch, Caplin & Drysdale, Chartered, New York City, for Asbestos Health Committee.

George A. Hahn, Hahn & Hessen, New York City, for Equity Security Holders Committee.

Matthew Gluck, Fried Frank Harris Shriver & Jacobson, New York City, for Leon Silverman, Legal Representative.

Batya Roth, Securities & Exchange Com'n, Washington, D.C.

John J. Jerome, Milbank, Tweed, Hadley & McCloy, New York City, for Creditors Committee.

Virginia M. Handal, Securities & Exchange Commission, New York City.

Ellen R. Werther, Weil Gotshal & Manges, New York City, for Owens-Illinois.

Michael L. Goldberg, Aaron H. Simon, Charles B. O'Reilly, George M. Rosenberg, Greene O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Washington, D.C., Vern Countryman, Cambridge, Mass., for Lawrence Kane Objectors; Jerrold T. Doros, Doros & Blessey, P.C., New York City, of counsel.

Robert Somma, Goldstein & Manello, Boston, Mass., for State Government Creditors Committee.

Ellen P. Chapnick, Wolf Popper Ross Wolf & James, New York City, for Schools Committee.

Charles F. Vihon, Gaston Snow & Ely Bartlett, Boston, Mass., for University of Missouri and Hospitals.

Michael O. Young, Deputy Chief, Office of Corp. Counsel, Affirmative Lit. Bureau, New York City.

Roy H. Carlin, Windels, Marx, Davies & Ives, New York City, for referred Stockholders Committee.

John F. Banzhoff, III, Action on Smoking & Health, Washington, D.C., pro se.

Harold Jones, U.S. Trustee, New York City.

E. Judge Elderkin, Frederick D. Holden, Jr., Brobeck Phleger & Harrison, San Francisco, Cal., for Fibreboard Corp.

Marc L. Greenberg, Eagle-Picher Industries, Inc., Cincinnati, Ohio.

James E. Hipolit, Acands, Inc., Lancaster, Pa.

George M. Cheever, Kirpatrick & Lockhart, Pittsburgh, Pa., for H.K. Porter Co.

Howard I. Rhine, Coleman & Rhine, New York City, for Armstrong World Industries, Inc.

Baldo M. Carnecchia, Jr., Montgomery McCraken & Walker, Philadelphia, Pa., for Celotex, Corp.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

On August 26, 1982 Johns-Manville Corporation and affiliated entities ("Manville") filed petitions for reorganization pursuant to Chapter 11 of the Bankruptcy Code. At that time Manville faced massive toxic tort liability, arising principally from asbestos related health and property claims, as well as the certainty of many, many more such claims in the future. In the ensuing nearly five years, the parties and Bankruptcy Judge Lifland have worked with skill and ingenuity to fashion a suitable plan of reorganization. Such a plan must provide for the compensation of today's asbestos victims without exhausting the resources necessary to care for tomorrow's victims. It must simultaneously account to the different types of potential tort plaintiffs, to creditors of Manville and to its shareholders. And it must do so within the framework of Chapter 11, since no other vehicle exists to deal with what is said to be the largest and most complex bankruptcy reorganization in history. *Cf. In re Johns-Manville Corp.*, (2d Cir.1986) (Oakes J., dissenting) 801 F.2d 60, 69-70; *In re Johns-Manville Corp.* 824 F.2d 176 (2d 1987).

On December 18, 1986 Judge Lifland entered an order approving the Second Amended and Restated Plan of Reorganization of Manville (the "Plan"). Although the Plan was largely consensual, certain groups have appealed from that Order, and from other virtually contemporaneous Orders which were necessary prerequisites of the Plan. Those appeals have been consolidated

before us. Briefs were filed, and on June 19, 1987 we heard oral argument on the following issues:

1) The Individual Shareholder Appellants ("Wright Group") appeal from the Order of Substantive Consolidation which brought together all the Manville entities for purposes of this reorganization, and also argue that the "cram-down" of the Plan under 11 U.S.C. § 1129(a) was improper because the Plan was not "fair and equitable" to the holders of Manville common stock.

2) The MacArthur Company appeals from the Order approving Manville's settlements with its insurance companies, claiming that MacArthur's rights as a co-insured have thereby been unjustly impaired.

3) The Kane Group, an alliance of asbestos health claimants who seek to bar future health claimants from participating in the Plan, argue that issuance of the injunction which prohibits present claimants from suing Manville and permits them only to sue a Trust Fund created under the Plan, was beyond the power of the Bankruptcy Court and that the Bankruptcy Court had no power over future claimants who do not have "claims" within the meaning of the Bankruptcy Code.

4) The Armstrong Appellants (including other companies with potential asbestos-related liability) argued that the Plan should more readily permit the Trustees of the Plan to join the "Wellington Facility," an industry-wide claims handling organization.

5) The Securities and Exchange Commission ("S.E.C.") argues that it was reversible error for Judge Lifland to have declined to appoint an "official" committee to represent the interests of the common shareholders.

We have carefully reviewed the various opinions written by Judge Lifland with respect to all of these contentions. With one exception about to be noted, we see no occasion for further writing on these subjects and affirm for substantially the reasons set forth in his various opinions.

The contention that Judge Lifland committed reversible error in declining to appoint an official committee is presented by the appeal of the Wright Group, supported by the S.E.C. By our Memorandum and Order of July 8, 1987, we directed further oral argument on a question relevant to that appeal. Decision as to that question is hereby reserved.

All other decisions by Judge Lifland are hereby affirmed.

SO ORDERED.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 82 B 11656/76
December 18, 1986
As Amended December 19
and December 23, 1986

In the Matter of
JOHNS-MANVILLE CORPORATION,

Debtor.

Matter came before court for confirmation of Chapter 11 plan of asbestos-related debtor. The Bankruptcy Court, Burton R. Lifland, Chief Judge, held that: (1) bankruptcy court had authority to issue injunction prohibiting asbestos-related claimants from bringing suit against reorganized entities or from seeking punitive damages; (2) disclosure statement was nonflawed; and (3) debtor in possession established by convincing evidence that plan was fair and equitable in accordance with cramdown requirements.

Order accordingly.

Levin & Weintraub & Crames, New York City, for debtors; Michael J. Crames, and Herbert S. Edelman, and Andrew Kress, and Edmund M. Emrich, of counsel.

Davis, Polk & Wardwell, New York City, for debtors; Stephen Case, and Lowell Gordon Harriss, and Laureen Bedell, of counsel.

Milbank, Tweed, Hadley & McCloy, New York City, for Creditors Committee; John J. Jerome, and John Gellene, of counsel.

Fried, Frank, Harris, Shriver & Jacobson, New York City, for Leon Silverman, Legal Representative; Matthew Gluck, of counsel.

Caplin & Drysdale, Chartered, New York City, for Asbestos Health Committee; Elihu Inselbuch, of counsel.

Hahn & Hessen, New York City, for Equity Security Holders Committee; George Hahn, of counsel.

Kronish, Lieb, Weiner & Hellman, New York City, for Certain Holders of Common Stock; Richard Lieb, and Laurence J. Kaiser, of counsel.

Covington & Burling, Washington, D.C., for Armstrong World Industries; David H. Remes, of counsel.

Coleman & Rhine, New York City, for Armstrong World Industries, Inc.; Howard I. Rhine, of counsel.

Jane Bevans, New York City, for Protestant Episcopal Schools.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheller & Rosenberg, Washington, D.C., for Lawrence Kane Objectors; Vern Countryman, and George Rosenberg, and Michael L. Goldberg, of counsel.

Nathan M. Fuchs, Virginia M. Handal, New York Regional Office United States Securities and Exchange Commission.

Weil, Gotshal & Manges, New York City, for Owens-Illinois; Ellen Werther, of counsel.

Whitman & Ransom, New York City, for U.S. Trust Company of New York; William M. Kahn, of counsel.

Wolf, Popper, Ross, Wolf & Jones, New York City, for Schools Committee; Ellen Chapnick, of counsel.

Gaston, Snow & Ely Bartlett, Boston, Mass., for University of Missouri and Hospitals; Charles F. Vihon, of counsel.

Goldstein & Manello, Boston, Mass., for State Government Creditors Committee; Robert Somma, of counsel.

Earl Parker, for Johns-Manville Corporation.

BURTON R. LIFLAND, Chief Judge.

I Introduction

Several days ago these huge, complex, unparalleled reorganization proceedings entered into a new phase, when their largely consensual plan was formally brought before this court as a candidate for confirmation.

Manville originally filed its petition for reorganization under chapter 11 in August of 1982. The troubled history of these reorganization proceedings has been discussed in some detail, most recently in *Equity Security Holder's Committee v. Johns-Manville Corp.*, (*In re Johns-Manville*

Corp.), 66 B.R. 517 (Bankr.S.D.N.Y.1986), *aff'd mem*, (S.D.N.Y. December 9, 1986). There is little need to review the Manville saga today, except to highlight some of the most recent events in the case. On November 20, the Debtor announced preliminary voting results on its reorganization plan. According to those results, the plan was overwhelmingly accepted by Asbestos Health Claimants, Property Damage Claimants, Unsecured Creditors and Preferred Shareholders. Common Shareholders were the only class to reject the plan.

The District Court has upheld this court's recent rulings denying the appointment of official committees to represent equity interests, *Carl M. Albero, Morton Macks et. al. v. Johns-Manville Corp., Official Committee of Unsecured Creditors, United States Trustee, the Official Committee of Asbestos-Related Litigants and/or Creditors and the Legal Representative for Future Claimants. (In re Johns-Manville Corp.)*, 68 B.R. 155, (S.D.N.Y.1986); and its decision enjoining the calling of a meeting of the Debtor's shareholders, *supra*. The Debtor's settlements with its insurance carriers, then totalling more than $700 million, were approved by this court, after a hearing on their fairness, held November 19, 1986. The Debtor subsequently concluded settlements with its remaining carriers. The various chapter 11 cases filed by the Debtor and its subsidiaries were substantively consolidated after a hearing before this court on December 9, 1986.

By means of an order submitted to this court on December 12, 1986, Hahn & Hessen, Esqs. sought to withdraw the objections to confirma-

tion previously filed on behalf of the Official Committee of Equity Security Holders (the "Equity Committee"), its individual members, and any successor committee on November 14, 1986. By endorsement the order was declined because, *inter alia*, it was noted to have been brought inappropriately and in an untimely manner. The withdrawal request was renewed at the confirmation hearing and was again refused. Accordingly, the filed objections shall be considered, along with the others.

The plan is the product of more than four years of effort to grapple with a social, economic and legal crisis of national importance within the statutory framework of chapter 11. Not surprisingly, this largely consensual plan is, by virtue of necessity, both creative and pragmatic in the solutions it proposes in response to the problems that afflict the Debtor, and indeed all parties in this reorganization.

One of the most innovative and unique features of the Manville Plan of Reorganization (the "Plan") is the establishment of two Trusts out of which all asbestos-related claims will be paid. An understanding of the features of these Trusts is necessary before an informed evaluation of the Plan, under the standards of § 1129 can be made.

The Asbestos Health Trust (the "Trust" or the "AH Trust") is a facility designed to resolve the claims of victims of asbestos-related diseases. It should be emphasized that this Trust draws no distinction between victims on the basis of the date of the manifestation of their disease. The Trust will initially be funded with $815 million in cash, receivables and insurance proceeds. The

Trust will also receive $75 million per year from Manville for a 24 year period commencing 3 years after its inception. Ultimate funding is in excess of approximately $2.5 billion. In addition, the Trust will own or have access to up to 80% of Manville's common stock. Finally, the Trust will have the right to call on up to 20% of the profits of the corporation, beginning 4 years after its inception and continuing for as long as necessary to satisfy asbestos health claims.

Two aspects of the financial structure of the Trust should especially be noted. First, the Trust, as a fiduciary for asbestos health victims will be the single largest stockholder in the reorganized debtor. The effect of this Plan will be to give the "tort victims" the beneficial interest in the ongoing operating corporate entity. Second, the Trust is guaranteed an "evergreen" source of funding by virtue of its 20% call on profits of the operating corporation. This funding of the Trust will continue until the last asbestos victim is found and paid. Thus an effort to determine the number and amount of AH claims with exactitude is not imperative. The imperative rather, is to ensure to the greatest degree possible the continuing viability of the reorganized corporation, which will fund the Trust, whatever the number and amount of claims happen to be. To protect and preserve the Manville operating entity, to help ensure the Trust's ability to honor its commitments, and to enhance the market value of the Trust's stock, the operating entities will be protected from further asbestos-related litigation by a combination of the discharge provisions of the Code and an injunction order (the "Injunc-

tion") prohibiting all parties with asbestos-related personal injury or property damage claims from suing certain protected entities.

The Property Damage Trust (the "PD Trust") is, similarly, a facility for resolving Class 5 asbestos-related property claims. The Trust will be funded initially with $125 million and will be entitled to any insurance settlement proceeds in excess of $615 million. To this will be added the remaining assets of the AH Trust, upon its termination.

A. Objections to Confirmation

Before discussing the Debtor's Plan in the context of § 1129 requirements, the court notes that the following objections to confirmation, many of which are on common grounds, have been filed:

1) A common shareholder, John MacLean, has challenged a provision of the Plan under which attorneys representing asbestos health claimants will be paid legal fees without review of those fees by this court.

2) Several Co-Defendants (the "Armstrong Objectors") have challenged the ability of the Asbestos Health Trust (the "AH" Trust") to satisfy all liabilities assumed by the Trust and provisions of the Plan which the Armstrong Objectors claim would disable the Trust from entering an industry wide claims handling facility, commonly known as the "Wellington Plan".

3) A group of Asbestos Health Victims (the "Kane Objectors") raise the following objections to the Plan:

a) The legal validity of that part of the Plan which seeks to enjoin asbestos-related suits against the reorganized Debtor (the "Injunction");

b) The terms of the Plan which transfer property of the estate to Class 6 claimants in lieu of post-petition interest;

c) The features of the Injunction which disallow punitive damages in asbestos-related claims against the Trusts;

d) The Debtor's estimates of the number of present and future asbestos health claims and the average costs of their disposition and thereby the feasibility of the Plan;

e) The validity of the voting procedures employed with respect to AH Claimants;

f) The Debtor's good faith in proposing the Plan; and

g) The Kane Objectors also assert that the Trust provided for in the Plan essentially amounts to a fraudulent conveyance. The court specifically finds that the Kane Objectors submitted neither credible evidence nor persuasive legal arguments that the provisions of this Plan meet those statutory prerequisites of §§ 544, 547 or 548 of the Code necessary to establish a fraudulent conveyance. Indeed, the court considers this objection only to the extent that it wishes to review all objections to confirmation.

4) The Equity Committee and the Wright Group (the "Equity Interests") have raised the following objections to the confirmation of the Plan:

a) The validity of the Injunction sought under the Plan;

b) The validity of Plan provisions which accommodate for the payment of future claims;

c) That portion of the Plan which provides consideration to Class 6 claimants in lieu of post-petition interests;

d) The provision of the Plan whereby attorneys representing AH victims would receive fees which have not been subject to court review;

e) That the Debtor has not proposed the Plan in good faith;

f) That confirmation votes were solicited on the basis of a misleading Disclosure Statement;

g) That the Plan is not in the best interests of common shareholders;

h) That the Plan is not feasible;

i) The provisions of the Plan which provide for $5 million of Trust funds to be spent on charitable purposes related to the treatment of asbestos-caused diseases; and provisions of the Plan which would allow, upon termination of both the AH and PD Trusts, a portion of the remaining assets in

the Trust to be applied to charitable purposes related to the treatment of asbestos related diseases. The $5 million charitable contribution inures to the direct benefit of AH victims and objections to it are unfounded. Objections to the distribution of some of the remaining Trust assets to charitable causes, are based on unrealistic and speculative assumptions which the court does not find credible. Furthermore, this distribution of the remainder of the Trust allows for favorable tax treatment benefiting the Trust which will inure to the benefit of health claimants. *See* Transcript of Fairness Hearing on Insurance Settlements, November 19, 1986, Tr. p. 29-32. Accordingly, these objections provide no obstacle to the confirmation of the Plan and are noted here only in an effort to be thorough.

j) And finally, the Equity Interests object to the confirmation of the Plan on the grounds that it is not fair and equitable.

5) A common shareholder, Action on Smoking and Health ("ASH") objects to confirmation of the Plan on the ground that the Debtor has, in failing to pursue alleged causes of action against cigarette manufacturers, failed to realize all available assets of the estate. ASH neither appeared, nor did it submit evidence in support of its objections at the hearing. Even were its bald assertions found credible, ASH failed to make any

cogent demonstration as to the real probability of any asset improvement.

B. Standing

Some of the Plan proponents have questioned the standing of each of the Objectors to raise *some* of the challenges to confirmation just enumerated. While § 1109 of the Bankruptcy Code states that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter", recent, persuasive case law has limited the standing of parties in interest to object to plan confirmation on appeal. *See, e.g. In re Evans Products Co., et al.*, 65 B.R. 870, 874 (S.D.Fla.1986) ("Appellants have standing only to challenge those parts of a reorganization plan that affects their direct interests."), *and In re Fondiller*, 707 F.2d 441 (9th Cir.1983) (only "aggrieved persons" may *appeal* an order of the Bankruptcy Court), *and In re Sweetwater*, 57 B.R. 743, 746 (D.Utah 1985) ("This court interprets the 'aggrieved person' test to mean that an appellant who is appealing from a Bankruptcy Court order, confirming a plan of reorganization, may challenge only those parts of the plan that directly, adversely, and pecuniarily affect the appellant."); *and see Holywell Corp. v. Bank of New York*, 59 B.R. 340, 349 (S.D.Fla. 1986).

Under these cases only parties adversely affected by provisions of a plan may raise an

objection to confirmation based on such provisions, on appeal. Thus, no party may successfully prevent the confirmation of a plan by raising the rights of third parties who do not object to confirmation. Although these cases discuss the question of standing on *appeal,* they are instructive with respect to the question of standing in a contested confirmation hearing. The doctrine of standing serves to protect the adversarial system which constitutes the cornerstone of American judicial process. Pursuant to this system, courts generally will only hear the arguments of parties who have a direct stake in the consequences of a proceeding. Thus a party who is not directly "aggrieved" by the construction of a provision of the Plan would lack the requisite standing to be heard. Nonetheless, in order to ensure that the interests of all parties in this proceeding have been protected, and because an objection by objection standing evaluation would be wasteful and counterproductive, this court has considered all the objections raised, regardless of the standing of the proponent.

II The Injunction

The nature of and legal basis for the injunction sought by the Debtor in its Plan of Reorganization has provided the basis for many objections to confirmation. It is concededly a cornerstone of the Plan.

A. The Provisions of the Injunction

Article IX, ¶9.2A(3) of the Plan of Reorganization provides that this court shall "supplement

the injunctive provisions of § 524 of the Code, staying, restraining and enjoining all Persons and Governmental Units from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claims, Interests or Other Asbestos Obligations [other than those provided for under the Plan]:"

The actions prohibited by this Injunction include: commencing, enforcing, perfecting, or setting-off any proceeding, judgment or interest against the Debtor or its subsidiaries or any settling insurance company, or any of their transferees, or against the Trust.

Article IX, ¶ 9.1 of the Plan states that "It shall be a condition precedent to the confirmation of this plan that on or prior to the confirmation date: (C) The court shall have entered: (5) an order barring the assertions of punitive damage claims by holders of Class 3 and Class 4 claims or by persons asserting other asbestos obligations."

Thus, the Injunction, effectively channels all asbestos related claims and obligations away from the reorganized entity and targets it towards the AH and PD Trusts for resolution. A feature of that resolution will be the unavailability of punitive damages awarded for the claimants.

B. The Objections to the Injunction

The Kane Objectors challenge the validity of the injunction as it applies to future claimants as well as the power of this court to issue the injunction and to disallow punitive damage claims. (Future claimants are persons "who have

been exposed to asbestos or asbestos products mined, manufactured or supplied by Manville [before the August 26, 1983 chapter 11 petition] and have manifested or will manifest disease post-petition and who are not otherwise represented in these proceedings." Order of August 14, 1984 Appointing Leon Silverman, Esq. Representative for Future Claimants.) The Equity Interests similarly challenge the Injunction as it applies to future claimants on due process grounds.

C. This Court has the Authority to Issue the Injunction

The Manville reorganization is "one of the most complicated and difficult bankruptcy reorganizations in history. . . ." *In re Johns-Manville Corp.*, 801 F.2d 60, 69 (2d Cir.1986) (Oakes, J., dissenting). Indeed, this case is also one of the most hard fought in reorganization annals. It has been estimated that there have been some 900 applications or motions, over 1000 orders, approximately 55 adversary proceedings, over 40 appeals (not including writs addressed to the U.S. Supreme Court), 300 odd hearings and thousands of pages of court transcripts.

Through it all, this court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings. As regards the presiding over and participation in this case, all parties have been keenly aware that this court sits both as a court of equity and as one charged with fulfilling a legislative mandate. Therefore, this reorganization can only succeed meaning-

fully if the Plan protects the equitable rights of parties in interest such as the present and future AH claimants as well as the statutory rights of all parties in interest.

A bankrupty court sits as a court of equity. As such this court may issue injunctions when necessary to effectuate reorganizations. *Continental Illinois Nat. Bank and Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110 (1935). This equitable power has been codified in § 105 of the Code and allows a bankruptcy court to enjoin proceedings in other courts to ensure the efficient administration of an estate, *see In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir.1986) ("In our view if the Bankruptcy Court may ever use its equitable powers under § 105(a) to enjoin actions pursued in other courts as 'concerning the administration of the estate' under § 157(b)(2)(A), it may exercise that power where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone by the other action."); *In re Equity Funding Corp. of America*, 396 F.Supp. 1266 (C.D.Cal.1975), *aff'd on other grounds*, 519 F.2d 1274 (9th Cir.1975); *In re Amber Lingerie, Inc.*, 30 B.R. 736, 737 (Bankr.S.D.N.Y.1983).

The effect of this equitable power is not limited to the pendency of a reorganization proceeding. Indeed, bankruptcy courts frequently issue injunctions that limit recourse against the debtor, far beyond the date of confirmation. *see, e.g., In re Abraham*, 421 F.2d 226, 227-28 (5th Cir.1970); *Gotkin v. Korn*, 182 F.2d 380, 382 (D.C.Cir.1950); *Reconstruction Finance Corp. v.*

Jacksonville Blow Pipe Company, 143 F.Supp. 601, 602-03 (N.D.Fla.1956), *aff'd*, 244 F.2d 394 (5th Cir.1957).

Injunctions which permit the sale of assets free and clear of third party interests, for example, typically channel the prosecution of those third party interests against the proceeds of the sale. This power to effectuate sales free and clear was recognized by the Supreme Court over 100 years ago. In *Ray v. Norseworthy*, the Court sanctioned such sales, and the channeling of third party claims, as long as the court rendered "to the parties interested their respective priorities in the proceeds" of the sale. 90 U.S. (23 Wall.) 128, 134 (1874).

Various Code sections, e.g. § 363(f) and (h), explicitly provide for the channeling of claims in this manner. The court's authority to channel claims is, however, by no means limited to such provisions. This authority is "granted by implication", even absent statutory provisions. *Van Huffel v. Harkelrode*, 284 U.S. 225, 227, 52 S.Ct. 115, 116, 76 L.Ed. 256 (1931); *and see Fierman v. Seward National Bank*, 37 F.2d 11, 13 (2d Cir.1930); *see also Farmers Bank v. Julian*, 383 F.2d 314, 322 (8th Cir.1967), *cert. denied*, 389 U.S. 1021, 88 S.Ct. 593, 19 L.Ed.2d 662 (1967); *Rubenstein v. Nourse*, 70 F.2d 482, 484 (8th Cir.1934); *In re Penn Central Transportation Co.*, 383 F.Supp. 1128, 1130 (E.D.Pa.1974).

This channeling authority has been appropriately used to limit the prosecution of a statutory claim against the debtor and to direct that claim to a particular property and the cash fund generated from its sale. *Forde v. Kee-Lox Mfg. Co.*,

Inc., 437 F.Supp. 631, 633 (W.D.N.Y.1977), *aff'd*, 584 F.2d 4, (2d Cir.1978); *see also, In re New England Fish Co.*, 19 B.R. 323 (Bankr.W.D.Wash. 1982). Furthermore, these channeling injunctions are inherently equitable, and not creatures unique to the bankruptcy courts. *See Texas v. Florida*, 306 U.S. 398, 405-06, 59 S.Ct. 563, 567-68, 83 L.Ed. 817 (1939); *State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967) *and see* Fed.R.Civ.P. 23(b)(1)(B).

The analogy to equitable channeling injunctions is quite compelling in this case. The Injunction sought under the Plan will preserve the rights of all asbestos claimants by establishing a corpus of funds from which all can collect. In the absence of the Injunction, the intended beneficiaries of the reorganization will certainly suffer. Furthermore, in the absence of the Injunction, one of the central purposes of Title 11, i.e. preventing the inequitable, piece-meal dismemberment of the debtor's estate, cannot be achieved. Therefore, this court finds that the Injunction contemplated by the Plan is well within its equitable and statutory authority.

D. The Injunction does not violate due process

The Equity Interests and Kane Objectors have also contended that the Injunction requested under the Plan is unconstitutional in that it would violate the due process rights of future claimants. The Injunction, it is asserted, will unconstitutionally bind future claimants to an

impairment of their rights without appropriate notice.

This court has long been aware of the delicate and difficult notice problems inherent in the Debtor's efforts to equitably resolve all of its asbestos-related liabilities. In its decision approving the appointment of the Legal Representative for Future Claimants, in January of 1984, the court noted:

> [T]he problem of sufficient notice of the impact of these proceedings on these putative claimants alluded to by the lower courts in *UNR* and *Amatex*, and raised by some of the movants herein, while difficult in the extreme, is a logistical one which can be handled by resort to innumerable media tools now availabe in our electronically aware society for use by the representative of future claimants.

In re Johns-Manville Corp., 36 B.R. 743, 754-55 n. 6, (Bankr.S.D.N.Y.1984), *aff'd*, 52 B.R. 940 (S.D.N.Y.1985).

Due process, of course, does not and has never, mandated personal, actual notice as the Objectors seem to suggest. The standard announced by the Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.* requires notice "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Indeed, in words that are particularly relevant here, the Court stated, "deprivation of life, liberty or property by

adjudication be proceeded by notice and opportunity for hearing *appropriate to the nature of the case*." (Emphasis added) *Id.* at 313, 70 S.Ct. at 656.

On August 28, 1986 this court signed an order pursuant to which the Debtor undertook an extensive campaign designed to provide the maximum amount of publicity, with respect to the confirmation process of this Plan, that was reasonable to expect of man and media. That campaign provided, *inter alia*, for national television and radio advertisements, newspaper advertisements in the six leading U.S. and Canadian newspapers and in the largest circulation daily newspaper in each state, the District of Columbia and each Canadian province. This publicity campaign was designed to inform as many future asbestos claimants as possible of the impact of the Manville reorganization upon whatever rights they might have against the Debtor and give them a voice in these proceedings. Such a form of notice clearly meets the standard set forth in *Mullane* where notice by publication is constitutionally adequate "to those beneficiaries whose interests are either conjectural or future." *Mullane*, 339 U.S. at 317, 70 S.Ct. at 659. *See, also, City of New York v. New York, New Haven and Hartford Rail Company*, 344 U.S. 293, 296, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).

In the present case, the Legal Representative for Future Claimants has been active in the Manville reorganization for over two years. He has been the catalyst for, if not the architect of this Plan. The Legal Representative was endowed upon his appointment with the full

panoply of statutory rights and duties of representation available to an official committee under the Code. *See, In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr.S.D.N.Y.1984). As this court noted, upon the appointment of the Legal Representative, binding unknown parties in interest to the outcome of judicial procedures in which they have been represented by a trustee, legal representative or guardian *ad litem* acting as a fiduciary for their interests, is not a novel phenomenon in the law. *See, e.g. Hatch v. Riggs*, 361 F.2d 559 (D.C.Cir.1966).

Finally, it is worthwhile to remember who due process will serve in this reorganization. The goal of the Plan and the purpose of the Injunction is to preserve the rights and remedies of those parties, who by an accident of their disease cannot even speak in their own interest. The impracticable, if not impossible version of due process envisioned by the Objectors would effectively destroy these rights and remedies. Theories and standards of "due process" are nothing more than the human effort to make the inchoate notions of justice and equity real and tangible to parties who stand before a court of law. The Objectors' "due process", which would deny asbestos victims justice and equity, is not a "due process" at all.

E. This court may enjoin the award of punitive damages

The Kane Objectors also contend that the Injunction is flawed in that it would prohibit the recovery of punitive damages by asbestos victims. To allow recovery of punitive damages, of course, would be to risk the depletion of Trust assets to

the benefit of known victims at the expense of future claimants. Such a result is inequitable on its face.

The purpose of punitive damages, furthermore, is to punish tortfeasors and deter them from their wrongful conduct. *See, e.g., Williams v. City of New York,* 508 F.2d 356 (2d Cir.1974); *Sibley v. K.L.M. Royal Dutch Airlines,* 454 F.Supp. 425 (S.D.N.Y.1978). Neither purpose would be served by permitting the recovery of punitive damages in this reorganization. Punitive damages under the Plan would be recovered from the Trust. The Trust is not, by any stretch of the imagination, a target to be deterred from wrongful conduct. As noted above, recovery of punitive damages will deplete the Trust at the expense of future victims. These future victims are not merely innocent parties, but rather injured parties who are inexorably backing into the present as their dreaded asbestos diseases manifest themselves. Punitive damages in this context would visit a hardship on this group for wrongs attributable to others. Therefore the policy to be advanced by permitting such damages would not be furthered in this reorganization. *See, e.g., Sanford v. Celotex Corp.,* 598 F.Supp. 529, 530-31 (E.D.Tenn. 1984) ("[T]he unique nature of asbestos litigation necessitates care not to exhaust in a limited number of large punitive damage awards funds needed for possible compensatory awards in multiple asbestos lawsuits.").

Finally, it should be observed that arguably under § 510 of the Code, bankruptcy courts have the *statutory* power to subordinate claims for punitive damages. Bankruptcy courts have cer-

tainly exercised their inherent equitable authority to subordinate and to disallow punitive damage claims. "The idea is that to allow a claim for punitive damages in these circumstances would make innocent creditors bear the burden of the debtor's wrongdoing." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 797 (7th Cir.1986); *and see, In re GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir.1982) ("We agree with the bankruptcy judge that the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing. Such a result would be inequitable, and the punitive damages claim was properly stricken.") Thus, whether or not punitive damages are recoverable in bankruptcy, it is well within the authority of this court to disallow a claim for punitive damages, in the circumstances of this case, where allowing such a claim would ill serve the policy of such awards. *See In re Colin,* 44 B.R. 806 (Bankr.S.D.N.Y.1984). Indeed, it is well within the equitable power granted by § 105 of the Code to preclude, by means of the Injunction, recovery of punitive damages in this reorganization.

III The Status of the Future Claimants

Several objections to confirmation revolve around the status of future asbestos victims and their claims in this reorganization. From the outset, it should be noted that in a very real sense, both from the point of view of the Debtor and from that of the asbestos victims, a distinction between "present" and "future" victims is, at best, nominal. The Trust does not make this

nominal distinction and is designed to satisfy the claims of all victims, whenever their disease manifests.

The future claimants are parties in interest, as defined by the Code, § 1109. *In re Johns-Manville Corp.*, 36 B.R. at 746; *and see, In re Amatex Corp.*, 755 F.2d 1034, 1041 (3rd Cir.1985) ("Whether or not future claimants have claims in the technical bankruptcy sense that can be affected by a reorganization plan, such individuals clearly have a practical stake in the outcome of the proceedings."); *accord, In re UNR Industries, Inc.*, 725 F.2d 1111 (7th Cir.1984).

Whether these parties in interest have claims that are cognizable in a reorganization proceeding, however, is not an issue which needs to be determined in order to confirm this Plan. Instead, the Plan treats the claims as "other asbestos obligations" ("OAO"), to be funneled into the same claims handling facility which administers the claims of present asbestos victims. OAO's will not be discharged upon confirmation. Instead they will be subject to the Injunction.

Although the definition of "claim" in § 101(4) of the Code is meant to be construed liberally, *see In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr.S.D.N.Y.1986); *In re Robinson*, 776 F.2d 30, 35 (2d Cir.1985), *rev'd on other grounds*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) (Reviewing the relevant case law on the definition of claim, the court noted the following characterizations: "broad", "very broad", "extremely broad", "could not be broader", "broadest possible", "all-encompassing", "sufficiently broad to cover any possible obligation"), two recent Third

Circuit cases have, nevertheless, adopted a more limited construction of the term. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.1985), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985).

Under *Schweitzer*, the determination of whether a claim exists turns on relevant state or federal non-bankruptcy law. Thus, in an Act case, where the Federal Employee Liability Act applied, a plaintiff exposed to asbestos prior to confirmation, but who did not manifest an asbestos-related disease until after confirmation, did not have a claim dischargeable upon confirmation. Similarly, in *Frenville*, where a cause of action did not arise until after the filing of a petition, although the underlying acts occurred prepetition, the plaintiff was held not to have a claim dischargeable in bankruptcy.

It should be noted, however, that both *Schweitzer* and *Frenville* explicitly questioned the applicability of their holdings as they might apply in cases similar to the one before this court. The *Frenville* court commented:

> "If there were some overriding federal policy, we might have the power to develop federal law. *See, In re Beck Indus., Inc.*, 725 F.2d 880, 891 (2d Cir.1984); *In re Johns-Manville Corp.*, 36 B.R. 743, 751 n. 4 (Bankr.S.D.N.Y), *appeal denied*, 39 B.R. 234 (S.D.N.Y.1984). A bankruptcy proceeding stemming from a mass tort—such as expo-

> sure to asbestos—may be a case in which the application of federal law is indicated."

744 F.2d 332, 337 n. 8 (3d Cir.1984); *and see, Schweitzer*, 758 F.2d at 944, n. 1.

Other courts confronted with the issue of future claims have contemplated a more inclusive definition of claim. The Seventh Circuit, in *UNR, supra*, for example stated that:

> A bankruptcy court's equitable powers . . . just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization . . . . Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to the end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done,". . . to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?

725 F.2d at 1119 (citations omitted).

The court in *In re A.H. Robins Co, Inc.*, similarly was reluctant to adopt a *Frenville* construction where such construction would disadvantage future claimants.

> If federal law were not created in this case, Robins could be subject to an ongoing battle with Dalkon Shield cases and would have to defend piece-meal litigation, which technically, if allowed, could be interpreted to fall outside the reorganization umbrella. This is

> just the type of chaos the drafters of the Code sought to avoid when they abandoned the concept of "provability" and "allowability" which was rooted in [the] old Act, and adopted, in its place, the more broad, and liberal definition of the term "claim" as presently found in the Code.

63 B.R. 986, 992 (Bankr.E.D.Va.1986).

The court in *In re Baldwin United Corp.*, was similarly critical of the *Frenville* decision.

> While the third-party cause of action of the accounting firm in *Frenville* may not have arisen under New York state law until *after* the petition was filed, its claim for bankruptcy purposes arose *before* the petition was filed. This is so because a "right to payment" under the definition of "claim" includes obligations which are neither matured, nor liquidated, nor fixed. 11 U.S.C. § 101(4)(A).

48 B.R. 901, 903 (Bankr.S.D.Ohio 1985). *See also, In re Edge,* 60 B.R. 690, 704 (Bankr.M.D.Tenn. 1986) *and In re Johns-Manville,* 57 B.R. 680, 689 (Bankr.S.D.N.Y.1986) ("It [the *Frenville* analysis] creates an artificial and arbitrary classification system by which the timing of a third-party lawsuit against the claimant determines not only the priority of distribution on a claim but also the dischargeability of the claim.")

Thus, were this court compelled to decide whether to distinguish between victims solely on the fortuitous basis of the time of manifestation of their diseases, this latter authority would,

indeed, be an imperative. As noted before, however, there is no need to reach this issue.

IV Standards for Confirmation Under § 1129

Courts may confirm a plan under § 1129, only if all the requirements of this section are met. One of the requirements of § 1129(a) is that each class of claims or interests either accept the plan or not be impaired by the plan. If, as in the present case, an impaired class does not accept the plan, the plan may still be confirmed pursuant to § 1129(b) ("cram down"). The plan, however, must also comply with all other provisions of § 1129(a).

A. Standards for Confirmation Under § 1129(a)

§ 1129(a) provides that "the court shall confirm a plan only if all of the following requirements are met":

(1) "the plan complies with the applicable provisions of this title".

Objections to confirmation raised under § 1129(a)(1) generally involve the failure of a plan to conform to the requirements of § 1122(a) or § 1123. § 1122(a) provides for the appropriate classification of claims. In the present case, claims against the Debtor are appropriately classified and no objections to their classification have been raised.

§ 1123(a) additionally provides that a plan must (1) designate the classes of claims against the debtor. Classes of claims and interests are appropriately designated in Article II of the

Debtor's Plan, pursuant to this requirement. § 1123(a)(2) provides that the plan of reorganization must specify classes which are unimpaired under the plan. Classes 1, 2 and 5 are appropriately designated as unimpaired in Article III of the Debtor's Plan, pursuant to this requirement. § 1123(a)(3) provides that treatment of impaired classes must be described in the plan. Article III of the Debtor's Plan also, appropriately describes the treatment of impaired classes, pursuant to this requirement. § 1123(a)(4) provides that all members of a particular class must be treated equally, unless a given member consents to less favorable treatment of his or her claim or interest. The Debtor's Plan, pursuant to this requirement provides for the equal treatment of each member of each particular class.

§ 1123(a)(5) requires that a plan provide adequate means for that plan's implementation. Article V of the Debtor's Plan satisfies this requirement. § 1123(a)(6) prohibits the issuance of non-voting equity securities by the reorganized debtor and ensures the appropriate distribution of voting power among the various classes of security interests. Paragraph 11.2 of Article XI of the Debtor's Plan provides for compliance with this requirement. § 1123(a)(7) provides that the method for appointing officers, directors or trustees under the plan comply with the interests of creditors, equity security holders and with public policy. The methods of appointment set forth in the Debtor's Plan comport with these requirements. Thus the Plan is acceptably structured under § 1122 and § 1123 and pass muster for the purposes of the § 1129(a)(1) requirement.

(2) "The proponent of the plan complies with the applicable provisions of this title."

Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code. *See, In re Butler*, 42 B.R. 777 (Bankr.E.D.Ark.1984); *In re Toy & Sports Warehouse*, 37 B.R. 141, 149 (Bankr.S.D.N.Y.1984). These sections provide for the appropriate manner of disclosure and solicitation of plan votes. In the present case, the Equity Interests have alleged that the Debtor's Disclosure Statement was misleading, in that it failed to apprise creditors and security holders that the Second Circuit reversed and remanded this court's decision of August 1985 enjoining the calling of a shareholder's meeting. The Kane Objectors allege that the Debtor's Disclosure Statement was misleading in that it failed to adequately inform creditors and shareholders of a) alleged legal infirmities with respect to the Injunction; b) the number of claims to be satisfied from the AH Trust; c) the alleged legal infirmity of plan provisions providing for payments to future claimants; and d) the alleged legal infirmities of the special voting procedures adopted for AH claimants.

Contrary to the objections of the Equity Interests, the Disclosure Statement was not flawed by its failure to report the decision of the Second Circuit reversing and remanding for further proceedings the August 1985 decision of this court that enjoined the call of a meeting of the Debtor's shareholders. This court approved the Disclosure

Statement on August 28, 1986. The Second Circuit's non-finally dispositive decision issued on September 10, 1986, after the Plan and Disclosure Statement had been disseminated and the voting process begun. Failure to report the Second Circuit's decision did not prejudice the interest of any party involved in these proceedings. On remand, this court, following an exhaustive hearing, decided, on October 28, 1986, to enjoin the efforts to call a shareholders meeting. No suggestion has been made that this too is a disclosure event. Furthermore, the standard implicit in the objection of the Equity Interests would have been impossible for any plan proponent to meet, in light of the sheer volume of appellate activity generated by these same Interests subsequent to the approval of the Disclosure Statement. The Code simply does not require disclosure of every interlocutory or non-final decision in a case to meet the standards of § 1125. It was never intended that a disclosure statement be a daily, weekly or periodical litigation newsletter.

As discussed, the Kane Group's objection to the Disclosure Statement for its alleged failure to adequately describe the legal infirmities of the Injunction is without merit. The Debtor's Disclosure Statement adequately describes the parameters and legal sufficiency of the injunction. Similarly the objections of the Kane Group based upon the alleged failure of the Disclosure Statement to adequately describe the impropriety of payments to future claimants under the Plan, are without merit. The status of the future

claimants in this case has already been discussed.

The Kane Objectors' challenge to the disclosure statement, based on its description of the number of claims to be paid by the AH Trust must also fail. No estimation as to the number of claimants or amount of claims to be paid can be made with absolute certainty. The debtor can only be required to make estimates which are reasonable. The evidence presented has adequately demonstrated the reasonableness of these estimates. Testimony established a floor of at least 50,000 in number of present claimants. They have become identifiable through the confirmation process. Furthermore, a $26,000 per claim disposition value estimate is amply supported by the empirical data relied upon. No rebuttal evidence was offered to cast doubt on these assumptions.

The Kane Objectors also challenge the legal adequacy of the voting procedures adopted for the AH claimants. On June 23, 1986 this court entered an order fixing, for the purposes of voting, the amount of each AH claim at one dollar. Acceptance by the AH class was conditioned upon acceptance by not less than 2/3 in number of the holders of such claims who voted on the Plan. Over 50,000 AH claimants voted, and with 3,000 ballots yet to be counted, *approximately 95%* of this class has accepted the Plan.

The basis of the Kane Objectors to this voting procedure is that it does not rigidly comply with §§ 501, 502 and 1126 of the Code. These objections ignore both the realities of this case, and the equities which need to be addressed there-

under. Furthermore, Fed.R.Bankr.P. 3018, specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest "in an amount which the court deems proper". The effect of the voting procedures adopted for AH claimants in this case has been to enfranchise the greatest possible number of asbestos health victims. The unstated goal of the Kane Objectors, on the other hand, would seem to be to silence the vast majority of those parties in interest who are the central concern of this reorganization and who apparently do not share the Objectors' negative view of the Plan solutions.

It has been the stated goal of this court and of the parties in interest throughout these proceedings to ensure the protection and participation of the interests of the asbestos health victims, *see e.g., In re Johns-Manville Corp.*, 66 B.R. 517, 522 (Bankr.S.D.N.Y.1986). The construct of the voting procedure is proper as it clearly meets the desideratum of expanded sufferage and participation in the reorganization by all parties in interest.

(3) "The Plan has been proposed in good faith and not by any means forbidden by law."

In considering whether a plan has been filed in good faith a court must determine "in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code." *In re Madison Hotel Associates*, 749 F.2d 410, 425 (7th Cir.1984). The Second Circuit has defined the good faith standard in the bankruptcy context "as requiring a show-

ing that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected'." *In re Koelbl,* 751 F.2d 137, 139 (2d Cir.1984).

The Equity Interests have alleged that the Debtor has acted in bad faith in negotiating the Plan, and that, therefore, the Plan cannot satisfy this requirement of the Code. This court, however, recently held to the contrary. The court, indeed, found that the parties in interest negotiated with Equity Interests in good faith, and that any failure of the negotiations from Equity's point of view was properly attributed to Equity's refusal to negotiate from the Plan. *In re Johns-Manville Corp.,* 66 B.R. 517, 531-32, 540-41 (Bankr.S.D.N.Y.1986), *aff'd mem.,* (S.D.N.Y. December 9, 1986).

The Kane Objectors contend that the Plan was proposed in bad faith, in that the Debtor sought, by its chapter 11 filing, to orchestrate nationwide asbestos-related litigation. The argument is bereft of merit. This court has already passed upon the reasons for and propriety of the Debtor's chapter 11 filing. *In re Johns-Manville Corp.,* 36 B.R. 727 (Bankr.S.D.N.Y.1984), *appeal denied,* 39 B.R. 234 (S.D.N.Y.1984), *reh'g denied,* 39 B.R. 998 (S.D.N.Y.1984), *mandamus denied,* 749 F.2d 3 (2d Cir.1985). Johns-Manville was and remains "a financially besieged enterprise in desperate need of reorganization of its crushing real debt, both present and future." *Id* at 741.

(4) "Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan,

for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."

The evidence establishes that all relevant payments contemplated by this section have been or will be made subject to the approval of this court.

The Equity Interests and Mr. MacLean would read this section to require this court to pass on fees, paid to attorneys representing asbestos health claimants, by their clients. These objectors, however, have cited no authority, which even by analogy, would support their interpretation of § 1129(a)(4). Furthermore, in connection with a contested matter, this court has already ruled that fee arrangements between AH claimants and their attorneys lie beyond the jurisdiction of the court:

> [T]he reasonableness of the contingency fee arrangement between individual creditors and their counsel does not affect the particular parties before me today [The Equity and Commercial Creditors Committees]. The Equity Committee may have and the Commercial Committee may have a legitimate opinion or opinions as to the general appropriateness of contingent fees, but they have no clear financial stake in the individual contracts that they question.

Transcript of Hearing on Motion for Court Review of Contingent Fees of Counsel for Asbestos Personal Injury Claimants, February

25, 1986, p. 76; *and see, Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir.1979).

The objectors here seek to raise a putative controversy between third parties, the merits of which may very well be subject to judicial determination at a later time and place, but which does not effect the administration of the Debtor's estate. The fee arrangement between a claimant and his or her attorney is immaterial to these reorganization proceedings. As such, these objections raise collateral disputes which this court is not empowered to rule upon. *See In re Paso Del Norte Oil Co.*, 755 F.2d 421 (5th Cir.1985), *In re Shirley Duke Associates*, 611 F.2d 15 (2d Cir.1979), *First State Bank & Trust Co. v. Sand Springs State Bank of Oklahoma*, 528 F.2d 350 (10th Cir.1976). Nothing stated herein should be construed as expressing approval or disapproval of individual contingent fee arrangements reached in a non-bankruptcy setting.

(5) Identities, affiliations and compensation of individuals proposed to serve as officers and directors of the debtors and individuals proposed to serve as trustees of the AH Trust and the Property Damage Trust have been disclosed and such appointments are consistent with the interests of creditors, equity security holders and public policy.

The Debtor has made detailed disclosures, pursuant to § 1129(a)(5) both in its Disclosure Statement and at the Hearing on Substantive Consolidation, December 9, 1986. The court also notes that no objections to confirmation have been raised under this section.

(6) "Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."

Because the Debtor is a widely diversified international company, the usual declaration of "non applicability of this section" was insufficient. In the instant case, witness testimony demonstrated that the Debtor is not subject to any regulatory rate governance commission.

§ 1129(a)(7) reads in relevant part "With respect to each impaired class of claims or interests— each holder of a claim or interest of such class —(i) has accepted the plan or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date."

In the present case, acceptance of the plan by impaired classes has not been unanimous. The Debtor's Plan, therefore, must provide each holder of a claim or interest with an amount equal to or greater than the amount he or she would receive under chapter 7, in order to comply with this section of the Code. The Property Damage Claimants, AH Claimants, Unsecured Creditors, Preferred Shareholders and Common Shareholders are all impaired classes under the Debtor's Plan. The Debtor has presented convincing evidence both in its Disclosure Statement

and at this hearing, establishing that each member of these impaired classes will receive more under this Plan, than they would upon liquidation of the Debtor.

As demonstrated by the Debtor's Liquidation Analysis, Exhibit 3, which was testified to by Mr. Thomas Stevens, President and Chief Executive Officer of the Manville Corporation, Transcript of Confirmation Hearing dated December 16, 1986 ("Tr."), p. 94 et seq, and by the Debtor's Value of Distribution to Classes 6 and 7, Exhibit 9, testified to by Mr. Byron Rose, Managing Director of Morgan Stanley, the Debtor's investment bankers, Tr. p. 190 *et seq.*, upon liquidation, each class of impaired claims or interests treated in this Plan would receive less than what the Plan itself provides for.

The Liquidation Value, Exhibit 6, testified to by Mr. Rose, Tr. 159, describes the assumptions and estimations made by the Debtor and its investment bankers in arriving at a liquidation value for the Manville corporation. This analysis assumed: 1) that the Debtor's businesses would be sold on a going concern basis; 2) that some sort of Injunction would protect the transferee entity; and that 3) the gross operating value of the business sold would suffer a 25% discount in the transaction. This discount reflects the risk perceived by the market in the Debtors asbestos and environmental liabilities and the loss in value associated with a forced sale. The court finds these assumptions to be quite reasonable.

Class 3, the Property Damage Claimants are considered to have an allowed claim of $125 million (based upon a negotiated compromise of

more than $80 billion in filed claims and a willingness to subordinate that interest to the AH victims). Upon liquidation, these claimants would receive between 56% and 81% of their allowed claims. The Plan provides for 100% of their claims. Tr. p. 110.

Class 4, the present Asbestos Health claimants have between $1.3 and $1.5 billion dollars in allowed claims. Upon liquidation, these claimants would again receive between 56% and 81% of their allowed claims. The Plan provides for 100% of their claims. Tr. p. 110.

Class 6, the General Unsecured Creditors, have an allowed claim of $472.5 million. They, too would receive between 56% and 81% of their claims on liquidation. The Plan provides for 100% of their claims. Tr. p. 110. Unlike the claimants in Classes 3 and 4, who will receive cash under the Plan, Class 6 claimants will receive a combination of cash and notes in payment of their claims. This package is reasonably estimated to equal 100% of their claims. Class 6 will also receive a package of securities valued between $84 and $126.1 million in lieu of post-petition interest. Tr. p. 191 *et seq.* This payment will be discussed more fully hereafter.

Class 7, Preferred Shareholders, have allowed claims (liquidating preference) of $413 million. Upon liquidation, members of this class would receive nothing for their interests. Under the Plan, Preferred Shareholders will receive a package of securities with an estimated trading value of $79 to $94 million. Tr. p. 110. The value of this package, as the value of the securities package received by Class 6 claimants, is of course a func-

tion of the trading price of the reorganized corporation's securities. The actual payment received by these classes, under the Plan, therefore, may fluctuate. Tr. p. 188. The court finds that the range of value estimated by the Debtor is reasonable.

Class 8, the common shareholders, do not have an allowed claim. Upon liquidation, the members of this class would receive nothing. As will be discussed hereafter the Debtor is insolvent and therefore there is no residual value remaining for Equity. Under the Plan, however, Equity will retain a share of the reorganized corporation the value of which the Debtor estimates at $15 to $18 million dollars. Tr. p. 110.

The Equity Interests have challenged the Debtor's liquidation analysis on the ground that it improperly includes payments to future claimants. As will be shown, this contention is unfounded.

(8) "With respect to each class of claims or interests—(A) such class has accepted the plan or (B) such class is not impaired under the plan."

In the present case, only one impaired class, the common equity holders, has not accepted the Plan. The Debtor, therefore, can only confirm its Plan of Reorganization if it meets the requirements of § 1129(b) as well as those of § 1129(a). The § 1129(b) requirements will be discussed hereafter. The Kane Objectors have suggested that the acceptance voted by the AH Claimants is invalid in light of the voting procedures adopted for that class. As previously discussed, this objection is without merit.

§ 1129(a)(9) provides for the appropriate treatment of various priority claims arising under § 507.

The Debtor has established by convincing evidence that this provision has been satisfied. Furthermore, no objection to confirmation has been raised under this section.

(10) "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

As previously noted, all impaired classes, with the exception of the common equity shareholders have accepted the Debtor's Plan. The provisions of this section have, therefore, been complied with.

(11) "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

The Debtor has established by convincing evidence the feasibility of this Plan. Indeed, the troubled history of the Manville reorganization suggeststhat this Plan is the *most* feasible plan of reorganization that any party in interest could propose. *See, e.g., In re Johns-Manville Corp.*, 66 B.R. 517 (Bankr.S.D.N.Y.1986), *aff'd mem.*, (S.D.N.Y. December 9, 1986).

A Bankruptcy Court, in determining the feasibility of a proposed plan of reorganization should

"scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable." *In re Monnier Brothers*, 755 F.2d 1336, 1341 (8th Cir.1985). The plan proponent is not required to *guarantee* the ultimate success of the reorganized company. *Id; In re Wolf*, 61 B.R. 1010, 1011 (Bankr.N.D.Iowa 1986). Rather, the plan proponent is only required to provide a "reasonable assurance of success". *In re Trail's End Lodge, Inc.*, 54 B.R. 898, 904 (Bankr.D.Vt.1985).

Manville has demonstrated at this hearing that it will, upon confirmation, be able to meet its cash distribution obligations under the Plan. Furthermore, the Debtor's reasonable and credible projections of future earnings have established that the reorganized corporation is unlikely to face future proceedings under this title.

As demonstrated in its Feasibility Analysis, Ex. 4, p. 18-19, and testified to by Mr. Stevens, Tr. p. 113 *et seq.*, Manville will generate enough cash to meet its Plan obligations and operating cash requirements, from its own operations and from a pending credit facility over the next five years. Tr. p. 130-36. The court is satisfied that the assumptions and estimations underlying this analysis are well founded. Similarly the projected balance sheets and cash flow statements presented by the Debtor, Ex. 4, p. 18-21, testified to by Mr. Stevens, Tr. p. 130 *et seq.* reveal a corporation which this court can be "reasonably assured" will succeed in its business environment for the foreseeable future and which is unlikely to face reorganization or liquidation in that time

period. Seasoned, experienced, operating management remain with this Fortune 500 company to provide a measure of additional post-confirmation stability.

The Kane Objectors and Equity Interests have contended that the present Plan is not feasible by again asserting a perceived legal infirmity grounded upon the accommadations made for future claimants. This contention is not well founded, as has been demonstrated. The Armstrong and Kane Objectors have challenged the feasibility of the Plan on the ground that the AH Trust will be unable to satisfy present and future AH claims. The evidence submitted by the Debtor as previously noted, provides a reasonable estimation, based upon known present claimants and reasonable extrapolations from past experience and epidemiological data, of the number and amount of asbestos-related claims that the AH Trust will be required to satisfy. The Debtor has also established that the Trust will, in fact, meet this burden. As has been shown, objections based on the status of future claimants and the dischargeability of their claims in this reorganization are not a relevant issue in this confirmation proceeding.

The Armstrong Objectors have questioned the feasibility of the Debtor's Plan on the ground that Plan provisions which allegedly preclude the Trust from joining an industry wide claims handling facility, *i.e.* the Wellington Facility, will result in the rapid depletion of Trust assets to the detriment of Trust beneficiaries. The Plan, however, clearly provides that the trustees, in accordance with their fiduciary obligations, may

merge the Trust with another claims handling facility. The Armstrong objection is unsupported by factual data to demonstrate compatibility of the Trust facility with the Wellington facility or how a fruitful synergism would result by merger. Counsel for the objectant candidly admitted that the existence of separate facilities could affect Wellington settlements. These competitive concerns do not remotely affect feasibility.

Therefore, based on these findings, this court concludes, that with the exception of the provision of § 1129(a)(8) all requirements of § 1129(a) have been satisfied.

B. Standards for Confirmation Under § 1129(b)

§ 1129(b) of the Code provides that "Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph.

(1) "If the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

As noted previously, Classes 1, 2 and 5 are not impaired by the Debtor's Plan. Classes 3, 4, 6, 7, 8 and 9 are impaired under the Plan. Class 8, the common shareholders, is the only class which voted to reject the Plan.

The language and legislative history of the statute provides little guidance in applying the "unfair discrimination" standard of § 1129(b)(1). Generally speaking, this standard ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes. Weintraub and Resnick, *Bankruptcy Law Manual,* ¶8.23[3] at p. 8-109-110 (revised ed. 1986); Klee, "All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code,"53 Am.Bankr.L.J. 133, 142 (1979). Thus a plan proponent may not segregate two similar claims or groups of claims into separate classes and provide disparate treatment for those classes. *See, e.g. In re Pine Lake Village Apartment Co.,* 19 B.R. 819 (Bankr.S.D.N.Y.1982); *compare In re Jartran, Inc.,* 44 B.R. 331 (Bankr.N.D.Ill.1984) (no unfair discrimination where separate classes receiving disparate treatment do not have comparable claims.)

In the present case, the interests of the Class 8 common shareholders are not similar or comparable to those of any other class. Thus, this court finds no unfair discrimination.

The applicable portion of § 1129(b)(2) provides: "For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements: (C) With respect to a class of interests:"

(i) "the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation prefer-

ence to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest;"

It should be noted that § 1129(b)(2)(C), by it terms, is not exclusive. Indeed a court may and should take additional factors into consideration in determining whether a plan is fair and equitable with respect to a dissenting class. *See, e.g., In re Jones*, 32 B.R. 951, 960 n. 14 (Bankr.D.Utah 1983) (" 'Fair and equitable' is a term of art which carries with it decades of judicial interpretation.... Congress clearly intended to transfer some of the judicial gloss placed on the fair and equitable test under former law into the fair and equitable test under § 1129(b). 124 Cong.Rec.H. 11,103 (September 28, 1978); S. 17,420 (October 6, 1978).")

A valuation of the debtor's business is, by virtue of the statutory language, almost a prerequisite to a determination that a plan satisfies the fair and equitable test of § 1129(b). Manville has clearly established, by credible evidence, that its debt exceeds even the best estimate of its "going concern" value. As a result, the post confirmation value of Equity's interest is zero.

Manville has reasonably estimated the gross value of its operating business to be between $1.6 and $2.0 billion dollars, on a discounted cash flow basis. *See*, Exhibit 6 *and* testimony of Mr. Rose, Tr. 159 *et seq*. This value was discounted to reflect the market's perception of the corporation's environmental and asbestos liabilities. As reflected in the Market Value Adjusted Balance Sheet, Ex. 7, testified to by Mr. Rose, Tr. 174 *et*

seq., the value of the assets of the corporation in chapter 11 are significantly exceeded by its liabilities, currently estimated to range between $2.6 and $4.2 billion dollars. As a result, the common equity residual value ranges between *negative* $2.2 billion and *negative* $331 million. Tr. p. 182-83. The corporation is insolvent.

As has been fully explained, this court need not determine whether future asbestos-related liability is more appropriately treated as a current debt of the estate or as a liability of the post confirmation entity. It is beyond peradventure that there will be future claimants with rights to payment for their asbestos-related injuries. As the Debtor has established, whether those payments come from the Debtor's estate or from the post-confirmation entity, future asbestos-related liability has a significant impact on the Debtor's liquidation and going concern valuation. Assuming *arguendo*, that these rights to payments are "claims", as defined by the Bankruptcy Code, they would constitute a portion of Manville's plan debt, to be subtracted from the Debtor's going concern value. The result would be no value left for equity. Alternatively, if these rights to payment are not "claims" as defined by the Code, and they are obligations that the reorganized Debtor will be required to satisfy, the going concern value of the reorganized Debtor would suffer a concomitant decrease in value. Under either scenario, the value available to Equity is zero.

Finally, the Kane Objectors and Equity Interests assert that the provisions of the Plan that give effect to the settlement of Class 6 claims reached between the Debtor, Unsecured Credi-

tors and every consenting constituency, violate the fair and equitable requirements of § 1129(b). Under this settlement Class 6 members will receive approximately 50% of their allowed claims on confirmation, and notes representing the remainder of their claims, payable some years after confirmation. Class 6 claimants, under this agreement, will also receive a package of securities in the reorganized corporation in lieu of post-petition interest on their claims. This package has an estimated market value substantially less than the calculable post-petition interest on their claims.

The Equity Interests contend that Class 6 claimants may not receive post-petition interest on their claims, under § 502(b)(2) and § 506(b). Furthermore, Equity argues, that to the extent that Class 6 creditors are receiving property in lieu of post-petition interest, they are receiving property which otherwise would inure to the benefit of common shareholders.

Nowhere does the Code prohibit payment of post-petition interest under a plan in a chapter 11 reorganization. The Equity Interests' reliance on §§ 502 and 506, moreover, is misplaced. Equity apparently understands § 506 to provide the *sole* circumstances in which a creditor may receive post-petition interest under the Code. The genius of the Bankruptcy Code lies in its breadth and flexibility. This court is more than reluctant to read exclusivity into a particular section of a statute, where such exclusivity is not explicitly provided for, and such a reading does not comport with the spirit of the statutory scheme.

Furthermore, this court fails to see the relevance of § 502 to Equity's objection. § 502 is a provision which addresses the allowability of contested claims. Under § 502(b)(2), a bankruptcy court must disallow that portion of a disputed claim which represents post-petition interest, after a hearing on the contested matter. The Plan provisions which provide property in lieu of post-petition interest, in contrast, represent a settlement of the claims of unsecured creditors reached among the parties. (The $472 million figure is a negotiated assumption.) The Class 6 agreement is simply not a contested matter under § 502. Indeed, the more appropriate analogy would be to Fed.R.Bankr.P. 9019, which authorizes a bankruptcy court to approve compromises and settlements.

In any event, even were Equity's reliance on these inapplicable code sections justified, the property paid in lieu of post-petition interest, would never inure to the benefit of common shareholders. At the very least, this property would be consumed in satisfying the claims of preferred shareholders, a class superior on the ladder of "absolute priorities" to common equity. *see, In re Evans Products Co.*, 65 B.R. 870, 875 (S.D.Fla.1986) ("Appellants [the shareholders committee and the debtors, objecting to the confirmation of a creditor's plan] argue that the Grossman Guarantee claim is worth $61.3 million rather than the $86.4 million claimed by the Lenders [the plan proponents]. If true, the Lenders would receive more than 100% of their claim. This would violate the 'fair and equitable' requirement of § 1129(b)(1). The Appellants

again have no standing to raise this issue because the amount the Lenders are to receive under the Grossman Guarantee claim is an accommodation made among the creditors. Only the creditors rights *vis-a-vis* each other would be affected-Appellants inability to participate would not be changed under the absolute priority rule. . . .")

The Kane Objectors also contend that the provisions of the Plan whereby Class 6 creditors receive property in lieu of post-petition interest violate § 1129(b) and § 1129(a)(7) of the Code. The latter section requires that dissenting members of an impaired class receive "at least the value their claim would have received upon the debtor's liquidation." As noted above, the liquidation value of Class 4 claims is significantly less than the full value of their claims that they will receive under this Plan.

There is serious doubt as to the appropriateness of measuring the treatment of Class 4 claims under the fair and equitable standards of § 1129(b). Under § 1129(b)(1), a "cram down" may be effected "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under *and* has not accepted, the Plan." 11 U.S.C. 1129(b)(1) (emphasis added). While Class 4 is impaired under this Plan, it has also voted overwhelmingly to accept the Plan. As noted in this section's legislative history: "It must be emphasized that the fair and equitable requirement applies *only to dissenting classes.* Therefore, unlike the fair and equitable rule contained in Chapter X and § 77 of the Bankruptcy

Act, under § 1129(b)(2) senior accepting classes are permitted to give up value to junior classes as long as no dissenting, intervening class receives less than the amount of its claim in full." 124 Cong.Rec. S17420 (daily ed. Oct. 6, 1978) (Remarks of Sen DeConcini) (emphasis added).

The agreement reached between Class 6 creditors and the other constituencies seems well within the contemplation of the Code. Here, all impaired classes senior to the unsecured creditors mutually agreed to a distribution of value available to creditors. In the words of the legislative history, they consented to "give up" value to which they had a right, in order to achieve a consensual plan.

Finally, it should be noted, that those asbestos health victims who have claims which are truly comparable to Class 6 claimants, i.e. liquidated, will receive post-petition interest on their claims, where permitted under applicable state law, under the Plan. Tr. p. 273-74.

V Conclusion

In conclusion, Manville has established by convincing evidence, that the Plan is fair and equitable in accordance with the requirements of § 1129(b). The Debtor is insolvent and no value remains for common equity. No class of interests junior to common equity shall receive property of the estate. Distribution under the Plan to classes senior to common equity is exceeded by the aggregate value of the claims of those classes. The objections to confirmation are denied.

The foregoing constitutes findings of facts and conclusions of law under Fed.R.Bankr.P. 7052. The Debtor is hereby ordered to submit an order of confirmation and all necessary implementing orders required pursuant to the Plan.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization
Under Chapter 11.
Case Nos. 82 B 11656,
82 B 11657, 82 B 11660,
82 B 11661, 82 B 11665 Through
82 B 11673 Inclusive,
82 B 11675, 82 B 11676 (BRL)

Filed December 22, 1986

In re

JOHNS-MANVILLE CORPORATION,
MANVILLE CORPORATION,
MANVILLE INTERNATIONAL CORPORATION,
MANVILLE EXPORT CORPORATION,
JOHNS-MANVILLE INTERNATIONAL
CORPORATION,
MANVILLE SALES CORPORATION,
f/k/a JOHNS-MANVILLE SALES CORPORATION,
successor by merger to MANVILLE BUILDINGS
MATERIALS CORPORATION, MANVILLE
PRODUCTS CORPORATION and MANVILLE
SERVICE CORPORATION,
MANVILLE INTERNATIONAL CANADA, INC.,
MANVILLE CANADA, INC.,
MANVILLE INVESTMENT CORPORATION,
MANVILLE PROPERTIES CORPORATION,

ALLAN-DEANE CORPORATION,
KEN-CARYL RANCH CORPORATION,
JOHNS-MANVILLE IDAHO, INC.,
MANVILLE CANADA SERVICE INC.,
SUNBELT CONTRACTORS, INC.,

Debtors.

ORDER CONFIRMING DEBTORS' SECOND AMENDED AND RESTATED PLAN OF REORGANIZATION

The above captioned debtors and debtors in possession (collectively "Manville" or the "Debtors"), having jointly filed with this Court under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* (the "Code") their Second Amended and Restated Plan of Reorganization dated August 22, 1986, including the addenda, exhibits and schedules thereto, as modified by the Modification dated and filed with this Court on December 16, 1986 (the "Plan") (hereinafter all capitalized terms in this order not defined in this order shall have the meanings defined in the Plan), and hearings having been held before this Court on notice to all creditors, shareholders and other parties in interest to these Cases to consider Manville's First Amended Disclosure Statement dated August 22, 1986 (the "Disclosure Statement"), and the Disclosure Statement having been approved by order of this Court dated August 28, 1986, and a copy of the Plan, the Dis-

closure Statement and various related materials having been transmitted to all known holders of Claims or Interests in these cases as provided in the order approving the Disclosure Statement, and the solicitation of acceptances from holders of Claims or Interests in these cases having been made in the manner required by this Court, and objections to the Plan and the confirmation thereof having been filed by John E. MacLean, Armstrong World Industries, Inc., et al., Lawrence Kane (who claims to speak for approximately 800 AH Claimants), Carl M. Alberto, et al. (approximately 300 holders of Manville common stock), Action on Smoking and Health and the former Committee of Equity Security Holders (collectively the "Objections"), and a full evidentiary hearing to consider confirmation of the Plan, the Objections and other matters relating to confirmation having been held before me on December 16, 1986 (the "Hearing") upon extensive notice as heretofore directed by this Court's order dated August 28, 1986 (the "Notice Order"), and the affidavits of service and publication filed herein evidencing compliance with the Notice Order, and upon the entire record of these Cases and the minutes taken before me at the Hearing, and upon the decision and findings of this Court issued on December 18, 1986 confirming the Plan (the "Decision"), which Decision is incorporated herein by reference, and upon the respective certifications of The Corporation Trust Company and Morgan Shareholder Services Trust Company appointed by the Notice Order to tabulate the ballots cast in favor of and in opposition to the Plan and the original ballots (the "Ballots")

having been filed herein, and upon all proceedings heretofore had herein, and after due deliberation and sufficient cause appearing therefor, and

IT APPEARING and the Court having found, that:

(a) The Plan, with the exception of Class 8 Interests, has been duly accepted in accordance with § 1126 of the Code by all classes of Claims or Interests impaired under the Plan.

(b) The Plan complies with the applicable provisions of chapter 11 of the Code.

(c) The Debtors, as proponents of the Plan, have complied with all applicable provisions of the Code.

(d) The Plan specifies the classes of Claims or Interests not impaired under the Plan.

(e) The Plan identifies the classes of Claims or Interests impaired under the Plan and specifies the treatment of Claims or Interests in such classes.

(f) The Plan provides the same treatment for each Claim or Interest of a particular class.

(g) The classification of Claims and Interests under the Plan is consistent with § 1122 of the Code.

(h) The Plan provides adequate means for the execution and implementation of the Plan.

(i) No governmental regulatory commission has jurisdiction over rates charged by the Debtors.

(j) The treatment of Claims under the Plan of the type specified in §§ 507(a)(1), 507(a)(3), 507(a)(4) and 507(a)(6) of the Code, complies with the provisions of § 1129(a)(9) of the Code.

(k) The primary purpose of the Plan is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933.

(l) The Debtors' objectives in proposing the Plan were to:

(i) Preserve and protect the viable businesses;

(ii) Provide a simple, economical procedure for obtaining and encouraging the prompt, efficient and equitable resolution of AH Claims and Other Asbestos Obligations and to provide for the efficient delivery of equitable compensation to all asbestos health claimants;

(iii) Resolve $80 billion of PD Claims through a claims facility and to avoid extensive mass litigation;

(iv) Provide payment to all other creditors; and

(v) Preserve value, to the extent possible, for equity security holders.

(m) The Plan has been proposed in good faith and not by any means forbidden by law.

(n) Any payments made or promised by the Debtors for services or for costs and expenses in

connection with the Plan and incident to these cases, have been disclosed to this Court, and any such payments made before confirmation are reasonable or, if such payments are to be fixed after confirmation of the Plan, such payments are subject to approval of this Court as reasonable.

(o) The Debtors have disclosed the identity and affiliations of the individuals proposed to serve, after confirmation of the Plan, as directors or officers of the reorganized Debtors and their affiliates and as trustees of the Trust and the PD Trust, and the continuance or appointment of such individuals to such offices is consistent with the interests of creditors, equity security holders, other parties in interest to these Cases and with public policy, and the Debtors have disclosed the identity of any insider that will be employed or retained by the reorganized Manville and the nature of any compensation for such insider.

(p) The procedures by which the Ballots were distributed and tabulated were fair, properly conducted and complied with the prior orders of this Court.

(q) In accordance with the special voting procedures approved by order of this Court dated June 23, 1986, Ballots accepting the Plan have been timely received from holders of Class 3 Claims representing more than two-thirds in number of buildings and more than one-half in number of Class 3 Claims which voted on the Plan.

(r) In accordance with the special voting procedures approved by order of this Court dated

June 23, 1986, Ballots accepting the Plan have been timely received from holders of Class 4 Claims representing more than two-thirds of the holders of such claims that voted on the Plan.

(s) With respect to the claims of the kind specified in Class 6 of the Plan, Ballots accepting the Plan have been timely received representing more than two-thirds in dollar amount and more than one-half in number of the holders of claims in Class 6 which voted on the Plan.

(t) With respect to Interests of the kind specified in Class 7 of the Plan, Ballots accepting the Plan have been timely received representing at least two-thirds in number of the Interests of such class which have been voted.

(u) With respect to Interests of the kind specified in Class 8 of the Plan (consisting of the holders of all outstanding shares of Manville Common Stock), Ballots accepting the Plan have been timely received representing approximately forty-eight percent in number of the Interests of such class held by the holders of such Interests who voted; thus, the Plan has not been accepted by Class 8.

(v) The Plan does not discriminate unfairly against and is fair and equitable with respect to Class 8 Interests and meets the requirements of § 1129(b) of the Code in that:

> (i) No class of Claims or Interests junior in priority to Class 8 Interests is receiving any property of the Debtors under the Plan;

(ii) The aggregate amount to be received by holders of Claims or Interests senior to Class 8 does not exceed the aggregate amount of such senior Claims or Interests;

(iii) On a "going concern" basis, the aggregate amount of Claims and Class 7 Interests exceeds the fair valuation of the Debtors' assets, thus, the value of the Class 8 Interests in the Debtors is zero on a best case basis (utilizing the highest value for the businesses and the lowest estimate of liabilities); and

(iv) With respect to Interests of the kind specified in Class 9 of the Plan, Ballots accepting the Plan have been timely received representing at least two-thirds in number of the Interests of such Class held by the holders of such Interests who voted. The Plan provides that holders of Class 9 Interests shall receive no property of the Debtors under the Plan.

(w) With respect to each class, each holder of a Claim or Interest of such class has accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Consummation Date, that is not less than the amount that such holder would receive or retain if Manville were liquidated under chapter 7 of the Code.

(x) At least one class of Claims has accepted the Plan, which acceptance has been determined without including any acceptance of the Plan by any insider holding a Claim of such class.

(y) The Plan is feasible. The Debtors have demonstrated their ability to meet their financial obligations under the Plan and continue their businesses in the regular course. Confirmation and consummation of the Plan are not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors, the Trust or the PD Trust.

(z) All securities to be issued by Manville pursuant to the Plan are being issued in exchange for Claims against or Interests in Manville.

(aa) The permanent injunction provided in Article IX, paragraph 9.2.A(3) of the Plan and which is set forth in paragraph 29 herein (the "Injunction"), is essential to the viability of the business operations of the Debtors and to the successful implementation of the Plan. Notice of the Injunction and other relief related to confirmation has been provided by means reasonably calculated to inform all those affected by this Order and the opportunity to object to the relief was afforded to all interested parties.

(bb) If the Injunction is not issued to protect the Debtors from the assertion of asbestos claims and liabilities, the Debtors' would be unable to continue operating their businesses and to make the payments required under the Plan, including payments to the Trust which will be used to pay in full AH Claims and Other Asbestos Obligations. In the absence of the Injunction, one of the central purposes of title 11, *i.e.* preventing the inequitable, piece-meal dismemberment of the Debtors' estates, cannot be achieved.

(cc) Barring the assertion of punitive damages by holders of AH Claims and Other Asbestos Obligations is in the best interests of all such persons because the payment of such damages would deplete funds available for all asbestos health claimants and could seriously delay or prevent compensation of persons who may assert Other Asbestos Obligations. The holders of AH Claims have voted overwhelmingly to accept the Plan which bars the assertion of punitive damage claims.

(dd) It would be an improper and inequitable result if holders of AH Claims were barred from asserting Claims for punitive damages while persons who may assert Other Asbestos Obligations were not so barred.

(ee) The conditions precedent to confirmation of the Plan have been satisfied, including

(i) The Debtors have received the tax rulings, opinions or other assurances referred to in Article IX, paragraph 9.1.A of the Plan and the other constituencies therein provided have indicated their satisfaction thereto;

(ii) The PD Guidelines have been established and are set forth in Annex 3 to the PD Trust Agreement;

(iii) The Court entered an order on August 28, 1986 fixing the last day for the filing of proofs of claims by holders of AH Claims;

(iv) The Court entered an order on December 12, 1986 substantively consolidating the Cases in accordance with Article VI of the Plan;

(v) The Court entered an order on June 23, 1986 establishing the method of voting on the Plan by the holders of Class 3 Claims and the holders of Class 4 Claims; and

(vi) This Order provides for the issuance of the Injunction, authorizes the Trust to implement the Claims Resolution Facility and the PD Trust to implement the PD Claims Resolution Facility, and bars the assertion of punitive damage claims by holders of Class 3 Claims, holders of Class 4 Claims (not including Liquidated AH Claims to the extent the final judgments provide for punitive damages) and by persons asserting Other Asbestos Obligations.

(ff) The Modification to the Plan dated December 16, 1986 does not adversely change the treatment of the Claim of any creditor or the Interest of any equity security holder who has not accepted the Plan.

(gg) The findings contained in the order of this Court dated December 18, 1986 approving the settlement agreements between the Debtors and the insurers and insurance brokers listed therein are incorporated herein by reference. In view of the retention of jurisdiction by this Court over all applications for approval of settlement agree-

ments between the Debtors and their insurers and insurance brokers; and whereas an application dated December 15, 1986 seeking approval of settlement agreements between the Debtors and Columbia Casualty Company and Continental Casualty Company were filed with this Court and will be considered and determined, upon entry of the findings and orders of this Court approving those settlement agreements, such findings and orders shall be deemed incorporated by reference in this Order.

(hh) It appears that the Debtors will satisfy each and every condition precedent to consummation of the Plan set forth in Article IX, paragraph 9.2 of the Plan.

(ii) The definition of "Postpetition Interest Ratio" set forth at M-154 of the Disclosure Statement, states that any Allowed Class 6 Claim that is solely a Claim for damages shall be deemed unliquidated for the purposes of clauses (w) and (x) of that definition. This does not affect the treatment of Class 6 Claims in an amount that has been liquidated by a Final Order, which will be entitled to compensation in lieu of postpetition interest as described in the Plan; and

IT FURTHER APPEARING and the Court having concluded as a matter of law as more fully discussed in the Decision that:

(a) The Court, as a court of equity whose jurisdiction is governed by equitable principles, has the constitutional and statutory power and authority to issue and enter the Injunction. Due and timely notice of the Injunction has been

given in a manner reasonably calculated under all the circumstances to apprise interested parties of the pendency of the hearing to consider the Injunction and afford them an opportunity to present their objections.

(b) The Court may exercise its equitable power and authority to issue injunctive relief where there is a basis for concluding that reorganization or rehabilitation of the Debtors might be undermined and frustrated by the actions sought to be enjoined.

(c) The Court has the power and duty to sift through the surrounding circumstances to prevent injustice or unfairness and has the power to create new remedies where those at law are inadequate.

(d) The Court has the equitable and inherent power and authority to channel claims to a specific *res* and may limit the direct or indirect prosecution of such claims against the Debtors and prohibit parties in interest from attempting to circumvent the Plan and the orders of this Court.

(e) In exercising its inherent equitable powers, the Court may grant injunctive relief to prevent direct or indirect interference with the administration of the estate and facilitate the Debtors' reorganization effort to enable the Debtors to achieve the ultimate objectives of chapter 11, reorganization and rehabilitation. The Court may enjoin or otherwise limit future litigation associated with the Cases which could undermine and frustrate the Plan or the Debtors' reorganization.

(f) The purpose of punitive damages is to punish tort feasors and to deter them from further wrongful conduct. This purpose would not be served by permitting AH Claimants and persons who may assert Other Asbestos Obligations to recover punitive damages from the Trust.

(g) The Court has the equitable power and authority to bar the assertion of punitive damages by persons who may assert Other Asbestos Obligations.

(h) Nothing in the Code prohibits payments in lieu of post-petition interest under a plan of reorganization in a chapter 11 case.

(i) The vesting of all property, assets and effects of the estates of each of the respective Debtors in each of the respective Debtors free and clear of all Claims and Interests of creditors and equity security holders and of Other Asbestos Obligations pursuant to § 1141(b) and (c) of the Code does not constitute a fraudulent conveyance.

IT IS THEREFORE,

NOW, on motion of LEVIN & WEINTRAUB & CRAMES and DAVIS POLK & WARDWELL, co-counsel to Manville,

ORDERED, ADJUDGED AND DECREED that:

(1) The Plan is hereby confirmed.

(2) Consistent with the Plan and in particular Article V thereof entitled "Means of Execution of the Plan", the following agreements and documents which are attached as exhibits to the Plan,

including all annexes thereto (collectively the "Agreements") and all terms and provisions thereof are hereby approved:

(a) The Manville Personal Injury Settlement Trust Agreement, the By-Laws, the Claims Resolution Procedures, the Supplemental Agreement, the Bond, the Second Bond and the Co-Defendants' Procedures;

(b) The Property Damage Settlement Trust Agreement, the PD By-Laws, the PD Claims Resolution Facility, the PD Distribution Guidelines, the PD Supplemental Agreement, the PD Bond, the Transfer Guidelines and the Note;

(c) The Class 6 Indenture;

(d) The Trust Note;

(e) The Class 6 Interest Indenture;

(f) The Warrant Agreement;

(g) The Special Fund Trust Agreement and Special Fund Trust By-Laws; and

(h) The Charter.

(3) Manville be and it hereby is authorized to enter into, execute, deliver and/or implement the Agreements and other documents and instruments substantially consistent therewith and any amendments to such Agreements as therein provided, and to take such other steps and perform such other acts as may be necessary to imple-

ment and effectuate the Plan and/or the Agreements approved in this Order.

(4) Donald M. Blinken, Daniel Fogel, Francis H. Hare, Jr., Christian E. Markey, Jr., John C. Sawhill and Harold R. Tyler, Jr. (collectively the "Trustees"), be, and they hereby are approved as trustees of the Trust.

(5) Honorable Thomas F. Eagleton, Robert B. McKay and Daniel Reed Weedon be, and they hereby are, approved as trustees of the PD Trust.

(6) Stanley J. Levy, Frederick M. Baron, Thomas W. Henderson, Gene Locks, Ronald L. Motely and the Trustees be, and they hereby are, approved as trustees of the Asbestos Victims Special Fund Trust.

(7) Distributions required to be made to the holders of Claims against and to the holders of Interests in the Debtors shall be made to the entities entitled thereto as provided in the Plan.

(8) The Plan and its provisions shall be binding upon the Debtors, any entity acquiring property under the Plan, any holder of a Claim against or Interest in the Debtors, whether or not the Claim or Interest of such creditor or equity security holder or obligation of any party in interest is impaired under the Plan and whether or not such creditor, equity security holder or party in interest has accepted the Plan.

(9) Except as otherwise provided in the Plan and the Agreements, the Debtors are discharged and released from any and all debts that arose before the Confirmation Date and any and all

debts of a kind specified in §§ 502(g), 502(h) or 502(i) of the Code whether or not (a) a proof of claim based on such debt has been filed under § 501 of the Code; (b) such Claim is allowed under § 502 of the Code; (c) such Claim is listed on the Debtors' schedules and lists heretofore filed herein; or (d) the holder of such Claim has accepted the Plan.

(10) Effective on the Consummation Date and in accordance with Article VII of the Plan, the Old Common Stock, the Old Preferred Stock, the JM Debentures, the JM Notes, the JM Debenture Indenture and the JM Note Indenture shall all be and hereby are deemed to be cancelled, terminated and void, rendered nugatory and of no force, effect or value.

(11) In accordance with Article VII of the Plan, in the event any holder of issued and outstanding Old Common Stock, Old Preferred Stock, JM Notes or JM Debentures fails within five (5) years after the Consummation Date to surrender to Manville, the JM Note Trustee or the JM Debenture Trustee, as the case may be, such certificates or other instruments evidencing the holder's interests, or the non-availability of his certificate or other instruments is established to the satisfaction of Manville, the JM Note Trustee or the JM Debenture Trustee, as the case may be, no distribution under the Plan shall be made to any such holder.

(12) All creditors and equity security holders of the Debtors or other entities whose Claims are discharged or whose Interests are terminated by the Plan and this Order are hereby jointly and

severally restrained and enjoined from instituting or continuing any action or employing any process to collect such debts or pursue such Interests as liabilities or obligations of the Debtors, except as otherwise specifically provided by this Order, the Plan or the Agreements. Except as otherwise provided in the Plan and the Agreements, all entities which are parties to adversary proceedings or contested matters pending before this Court, which proceedings are not finally determined as at the date of this Order, are restrained and enjoined from commencing any other proceedings or taking any other actions against the Debtors with respect to any issue raised in such adversary proceedings or contested matters, except upon further order of this Court.

(13) Effective upon the Confirmation Date, pursuant to the provisions of § 1141(b) and (c) of the Code, all property, assets and effects of the estates of each of the respective Debtors shall vest in each of the respective Debtors, free and clear of all Claims and Interests of creditors and equity security holders and of Other Asbestos Obligations.

(14) In accordance with the order substantively consolidating the Cases dated December 12, 1986, all proceeds, together with the interest earned thereon, being held in escrow by the Debtors or which proceeds the Debtors were prohibited from using in the ordinary course pursuant to the (i) order approving the sale of real property in Bossier Parish, Louisiana dated September 8, 1982; (ii) order authorizing the sale of assets of Transponder Corp. dated November

24, 1982; (iii) order authorizing sale of property in Sun Valley, Idaho dated March 11, 1983; (iv) order authorizing sale of shares in Belgium Operations dated February 25, 1983; (v) order authorizing sale of shares of certain Eternit Companies dated March 25, 1983; (vi) order authorizing sale of property in Winnfield, Louisiana; (vii) order authorizing sale of shares of Canadian Operations dated August 11, 1983; (viii) order authorizing sale of certain property located in West Monroe, Louisiana dated August 29, 1983; (ix) order authorizing sale of shares in Canadian Operations dated September 15, 1983; (x) order authorizing conveyance of real property to the Valley Joint Venture dated November 1, 1983; (xi) order approving transfer of assets to Pine Pipeline dated December 21, 1983; (xii) order authorizing sale of property in Edison, New Jersey dated January 12, 1984; (xiii) order authorizing sale of property in Fresno, California dated January 12, 1984; (xiv) order authorizing sale of shares in Papier Kingsey Falls dated February 1, 1984; (xv) order authorizing sale of real property in Monroe, Louisiana dated March 9, 1984; (xvi) order authorizing sale of assets of Sunbelt Contractors, Inc. dated March 13, 1984; (xvii) order approving sale of aircraft dated September 12, 1985; (xviii) order authorizing sale of assets of Manville Canada, Inc. dated January 7, 1986; (xix) order authorizing capital expenditure to purchase and sell corporate aircraft dated September 23, 1986; and (xx) any other order which restricted the Debtors from using proceeds realized from the sale or transfer of assets, are hereby modified solely to the extent that pro-

ceeds of such sales shall be available for use by the Debtors in the ordinary course of business, including but not limited to, the payment of the Debtors' obligations under the Plan and the provisions of the aforesaid orders are deemed modified solely to the extent of deleting any restriction on Manville's use of such cash.

(15) Effective as of the Consummation Date as provided in Article IV, paragraph 4.1 of the Plan, title to the property of Manville set forth and described therein shall be transferred to and automatically vested in the Trust as set forth in the Plan and the Trust Agreement.

(16) Effective as of the Consummation Date as provided in Article IV, paragraph 4.2 of the Plan, title to the property of Manville set forth and described therein shall be transferred to and automatically vested in the PD Trust as set forth in the Plan and the PD Trust Agreement. In addition, effective on the Consummation Date, the Trust shall transfer to the PD Trust, in accordance with Article IV, paragraph 4.2 of the Plan and the PD Supplemental Agreement, $25 million in cash together with any interest accrued on such cash for the period and at the rate specified in Article V, paragraph 5.4 of the Plan.

(17) On the Consummation Date, Manville shall transfer and assign, or cause to be transferred and assigned, to the Special Fund Trust $5 million in cash, together with interest accrued thereon pursuant to Article V, paragraph 5.4 of the Plan.

(18) Pursuant to Article VIII of the Plan, and in accordance with § 1123(b)(2) of the Code, except for any and all executory contracts and unexpired leases and subleases of the Debtors that (a) are the subject of pending motions to reject or (b) have been rejected by the Debtors pursuant to previous orders of this Court or (c) are set forth and described in paragraph 8.2 of Article VIII of the Plan, all executory contracts and unexpired leases and subleases of the Debtors are assumed by the Debtors effective on the Consummation Date, at which time the Debtors shall cure any monetary defaults existing with respect to such executory contracts and unexpired leases and subleases upon the Consummation Date, or as soon thereafter as may be practicable; *provided, however*, that in the event of a dispute between the Debtors and any other party to such executory contract or unexpired lease or sublease with respect to the amount of an existing monetary default, the parties shall endeavor to resolve such dispute within thirty (30) days following entry of this order and, thereafter shall, if necessary, submit any remaining controversies to this Court for resolution. The Court shall retain jurisdiction for the purpose of determining all controversies with respect to the amount of such monetary defaults.

(19) Pursuant to Bankruptcy Rule 3002(c)(4), proofs of claim for damages arising from the rejection of executory contracts and unexpired leases and subleases pursuant to Article VIII, paragraph 8.2 of the Plan shall be filed with the Clerk of the Court and the Debtors within thirty

(30) days after the mailing of notice of entry hereof to the parties thereto. With respect to executory contracts and unexpired leases and subleases which are the subject of motions to reject which are pending as of the date of this Order, within thirty (30) days of entry of an order authorizing the Debtors to reject such executory contracts and unexpired leases and subleases, proofs of claim for damages arising by virtue of the rejection of such agreements shall be filed with the Clerk of the Court and served upon the Debtors.

(20) The filing of proofs of claim for damages arising from the rejection of executory contracts and unexpired leases and subleases shall be without prejudice to the rights of the Debtors to object to any such proofs of claim.

(21) The Debtors may file within sixty (60) days from the date of receipt of notice that any proof of claim is filed in accordance with paragraph (19) herein, any and all objections to the allowance of any such Claim and shall bring on such objections for hearing within one hundred (100) days from the date of receipt of notice that any such proof of claim has been filed, unless such periods of time are extended by order of the Court for cause shown, and in the event of a failure to do so, any objections to the allowance of the Claims affected thereby will be deemed waived.

(22) Pursuant to the Plan, and in accordance with § 1123(a)(5)(I) of the Code, Manville is hereby authorized to take such corporate action as may be necessary and appropriate to imple-

ment and effectuate the consummation of the Plan and this Order. This Order shall constitute all approvals and consents, if any, required by the General Corporation Law of the State of Delaware (the "Corporation Law") with respect to the implementation and consummation of the Plan.

(23) In accordance with Article XI, paragraph 11.2 of the Plan, the Charter of Manville be and it hereby is amended to prohibit the issuance of non-voting equity securities during the term of the Plan and Manville is directed to take such corporate action and execute such documents as may be necessary to give effect to the amendment contemplated by the Plan and authorized by this Order.

(24) The Charter shall be filed with and accepted by the Secretary of the State of Delaware and recorded in accordance with § 103 of the Delaware Corporation Law and shall thereupon become effective in accordance with its terms and the provisions of the Delaware Corporation Law.

(25) Except with respect to Class 3 Claims and Class 4 Claims, and except as otherwise provided in this Order, the Debtors may file within one hundred and twenty (120) days from the date of this Order any and all objections to the allowance of any Claim not heretofore objected to, including any and all applications to amend their Schedules, and shall bring on such objections or applications for hearing within one hundred and sixty (160) days from the date of this Order, unless such periods of time are extended by order of the

Court for cause shown, and in the event of a failure to do so, any objections to the allowance of the Claims affected thereby will be deemed waived. With respect to Contribution Claims, objections to such claims shall be filed in the manner and by the time provided in the Co-Defendants' Procedures. The Debtors may file within one hundred and twenty (120) days from the date of this Order any and all objections to the allowance of any Indemnity Claim not heretofore objected to and shall bring on such objections for hearing within one hundred and sixty (160) days from the date of this Order, unless such periods of time are extended by order of the Court for cause shown, and in the event of a failure. to do so, any objections to the allowance of Indemnity Claims affected thereby will be deemed waived.

(26) Any and all objections to PD Claims filed by any party in interest in these cases which are pending as of the date of this Order be, and they hereby are, dismissed with prejudice.

(27) The Debtors are hereby authorized and directed to make distribution of the payments required on the Consummation Date, as defined in the Plan, or as soon as practicable thereafter.

(28) The Court hereby retains jurisdiction of these proceedings pursuant to and for the purposes of §§ 105(a) and 1127 of the Code and for such purposes as may be necessary or useful to aid the confirmation and consummation of the Plan and implementation of the Plan as provided in the Plan and for the following purposes, *inter alia*:

(a) To determine any and all objections to the allowance of Claims to the extent permitted by law (excluding Class 3 Claims and Class 4 Claims other than Contribution Claims and Indemnity Claims, to the extent the Plan provides that the allowance of such Claims shall be determined by the Court) and amendments to Schedules;

(b) Except as otherwise provided in paragraph (21)(a) above, to determine any and all disputes arising under the Plan, the Trust Agreement, the PD Trust Agreement, the annexes and exhibits to the PD Trust Agreement and the Settlement Agreements;

(c) To determine any and all applications for allowance of compensation and reimbursement of expenses herein;

(d) To determine any and all pending applications for rejection of executory contracts and unexpired leases and the allowance of any Claims resulting from the rejection thereof or from the rejection of executory contracts or unexpired leases pursuant to the Plan;

(e) To determine any and all applications for approval of Settlement Agreements and to grant and enforce appropriate orders in connection therewith;

(f) To enforce and administer the provisions of the Plan and, to the extent expressly provided therein, the exhibits thereto and the annexes to the exhibits;

(g) To modify any provision of the Plan to the full extent permitted by the Code;

(h) To correct any defect, cure any omission or reconcile any inconsistency in the Plan or this Order as may be necessary to carry out the purposes and intent of the Plan;

(i) To determine such other matters as may be provided for in this Order or as may from time to time be authorized under the provisions of the Code, any other applicable law including, without limitation, matters contemplated under Section 6.03(c) of the PD Trust Agreement;

(j) To enforce all orders, judgments, injunctions and rulings entered in connection with the Cases; and

(k) Enter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan.

(29) All Persons and Governmental Units are hereby stayed, restrained and enjoined from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or, receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation (other than actions brought to enforce any right or obligation under the Plan, any exhibits to the Plan or any other agreement or instrument between the Debtors and the Trust or the PD Trust, which actions must be in conformity and compliance with the provisions of the Plan):

(a) Commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding (including, without limitation any thereof in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor;

(b) Enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any means or in any manner, whether directly or indirectly, any judgment, award, decree or other order against the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor;

(c) Creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any Encumbrance against the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing Persons, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Per-

sons, or any property of any such transferee or successor;

(d) Setting-off, seeking reimbursement of, contribution from or subrogation against or otherwise recouping in any manner, directly or indirectly, any amount against any liability owed to the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons except as provided in Paragraphs 3.1 and 3.2 of the Plan;

(e) Proceeding in any manner and any place with regard to any matter that is subject to resolution pursuant to the Claims Resolution Facility, except in conformity and compliance therewith; and

(f) Proceeding in any manner in any place with regard to any matter that is subject to resolution pursuant to the PD Claims Resolution Facility except in conformity and compliance therewith, until the termination of the PD Trust.

The provisions of the Injunction barring the assertion of AH Claims and Other Asbestos Obligations against the Debtors shall terminate upon termination of the Trust.

(30) If the period for commencing a civil action on an asbestos-health claim under the applicable statute of limitation did not expire before August 26, 1982, then such period does not expire until the later of (a) the end of such period as provided in the applicable statute of limitations or (b) one

hundred and twenty (120) days after this Order becomes final.

(31) Pursuant to § 1145 of the Code and the provisions of the Securities Act of 1933, as amended (and the regulations pertaining thereto), regarding the issuance, distribution, offer, sale or registration of securities pursuant to the Plan, Manville is exempt from the registration requirements of the Securities Act of 1933. Such exemption shall include, without limitation, Manville Common Stock, Class 6 Interest Debentures, Class 6 Notes, the Note, the PD Bond, the Bond, the Second Bond, the Series A Preferred Stock, the Series B Preference Stock, the Trust Note and the Warrants.

(32) Pursuant to Section 1146(c) of the Code, the issuance, transfer or exchange of a security under the Plan or the revesting, transfer and sale of any real or personal property of Manville in accordance with the Plan shall not be taxed under any state or local law imposing a stamp tax, transfer tax, or similar tax.

(33) With respect to any action based upon a Class 5 Claim commenced prior to the Filing Date in another forum, if the holder of such Claim and the Debtors have not agreed to the settlement of the Claim within ninety (90) days after the Confirmation Date, such action shall, upon the request of the holder of the Class 5 Claim, proceed in the forum in which it was originally commenced, no longer subject to any stay or impediment arising out of this Order or in connection with the Cases.

(34) The Trust be and it hereby is authorized to implement the Claims Resolution Facility.

(35) The PD Trust be and it hereby is authorized and directed to implement the PD Claims Resolution Facility.

(36) All holders of Class 3 Claims and Class 4 Claims (not including Liquidated AH Claims to the extent the Final Judgments provide for punitive damages) and all persons asserting Other Asbestos Obligations be and they hereby are forever barred from asserting punitive damages against the Trust, the PD Trust or the Debtors. Notwithstanding the foregoing, in any case where a death was caused, if the law of the place where the act or the omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, then holders of Class 4 Claims and/or Persons asserting Other Asbestos Obligations shall not be barred from the assertion of Claims for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the Persons respectively, for whose benefit the action was brought, in lieu thereof.

(37) The transfers of property by Manville to the Trust and the Special Fund Trust pursuant to the provisions of Article IV, paragraphs 4.1 and 4.6 of the Plan, the Bond, the Trust, the Note and the Supplemental Agreement (a) are legal, valid and effective transfers of property, (b) vest in the Trust or the Special Fund Trust, as the case may be, good title to such property free and clear of all Encumbrances, debts, obligations, liabilities and Claims, other than Class 4 Claims,

Other Asbestos Obligations and all other liabilities and obligations of the Trust pursuant to the Trust Agreement, the Supplemental Agreement and the PD Supplemental Agreement, (c) do not constitute fraudulent conveyances under the Code or under the laws of the United States, any State, territory, possession or the District of Columbia and (d) do not, except as contemplated by the Trust Agreement and the Supplemental Trust Agreement, subject the Trust, the Special Fund Trust, the Trustees, the Trustees of the Special Fund Trust or the property so transferred to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

(38) The transfers of property by Manville and the Trust to the PD Trust pursuant to the provisions of Article IV, paragraph 4.2 of the Plan and the PD Supplemental Agreement (a) are legal, valid and effective transfers of property, (b) vest in the PD Trust good title to such property free and clear of all Encumbrances, debts, obligations, liabilities and Claims other than Class 3 Claims and all other liabilities and obligations of the PD Trust pursuant to the PD Trust Agreement and the PD Supplemental Agreement, (c) do not constitute fraudulent conveyances under the Code or under the laws of the United States, any State, territory, possession or the District of Columbia and (d) do not, except as

contemplated by the PD Trust Agreement or the PD Supplemental Agreement, subject the PD Trust, the PD Trustees or the property so transferred to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

Dated: New York, New York
December 22 1986 at
12:07 o'clock p.m.

/s/ BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE

[SEAL]

NOTICE OF ENTRY

Please take notice that the within is a (*certified*) [ILLEGIBLE] copy of a [ILLEGIBLE] entered in the office of the clerk of the within [ILLEGIBLE] court on [ILLEGIBLE]

Yours, etc.,
LEVIN & WEINTRAUB & CRAMES

Attorneys for

Office and Post Office Address
225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

Attorneys for

NOTICE OF SETTLEMENT

Please take notice that an order

which the within is a true copy will be presented settlement to the Hon.

of the judges of the within named Court, at [ILLEGIBLE]

Yours, etc.,
LEVIN & WEINTRAUB & CRAMES

Attorneys for

Office and Post Office Address
225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

Attorneys for

Index No. 82 B 22656 Through
82 B 11676 (BRL)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

JOHNS-MANVILLE CORPORATION, et al.,

Debtors.

ORDER CONFIRMING DEBTORS' SECOND AMENDED AND RESTATED PLAN OF REORGANIZATION

LEVIN & WEINTRAUB & CRAMES

Attorneys for Debtors.

225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

(212) 962-3300

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82 B 11656
through 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

NOTICE OF SUBMISSION OF
ORDER AND INTENTION TO
OBTAIN ENTRY THEREOF

SIRS:

PLEASE TAKE NOTICE that an "Order With Respect to Insurance Settlement Agreements" of which the within is a true copy will be presented for approval and entry to the Honorable Burton R. Lifland, United States Bankruptcy Judge, at the United States Courthouse, Foley Square, New York, New York 10007 on December 18, 1986 at 10:00 A.M. in Room 237 and notice of the relief requested is being given to all parties listed on the service list attached to such order.

Dated: New York, New York
December 17, 1986

YOURS, etc.

Attorneys for Johns-Manville
Corporation, *et al.*, Debtors
and Debtors in Possession

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

LEVIN & WEINTRAUB & CRAMES
225 Broadway
New York, New York 10005
(212) 962-3300

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82 B 11656
through 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

ORDER

WHEREAS, Manville Corporation, for and on behalf of itself and each of its affiliates, Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.), and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), debtors and debtors in possession in these proceedings (collectively, "Manville"), have entered into various settlement agreements (collectively, the "Settlement Agreements"), with certain settling insurers and insurance brokers (collec-

tively, the "Settling Insurers"), identified in the list attached hereto as Exhibit A;

WHEREAS, by applications dated August 2, 1984 and October 27, 1986 (the "Applications") Manville sought approval of the Bankruptcy Court, pursuant to Rule 9019 of the Rules of Bankruptcy Procedure, of the Settlement Agreements;

WHEREAS, upon notices duly given, hearings pursuant to Rule 9019 of the Rules of Bankruptcy Procedure were held on various aspects thereof at various dates, including November 19, 1986, to consider approval of the Settlement Agreements; and

WHEREAS, the Court has duly considered the Applications, and the testimony offered at said hearings;

IT IS HEREBY ORDERED AND ADJUDGED AND DECREED that after consideration of the foregoing and the materials referred to above:

> The Settlement Agreements listed on Exhibit A hereto, and the execution, delivery and performance of such Settlement Agreements by Manville, are hereby approved pursuant to Rule 9019 of the Rules of Bankruptcy Procedure.

1. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of November 22, 1985, between The Aetna Casualty and Surety Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

1.1 *Definitions.* As used in this Paragraph and Paragraph 1.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Second Amended and Restated Plan of Reorganization of Manville Corporation dated August 22, 1986, as filed with this Court on June 4, 1986, as it may be amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
01 XN 773 WCA	7/01/75 - 7/01/76
01 AL 260802 SRA	7/01/76 - 7/01/77
01 XN 1053 WCA	7/01/76 - 7/01/77
985 LG 30516 SRA	7/01/76 - 7/01/77
01 XN 1405 WCA	7/01/77 - 7/01/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all mem-

bers of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of November 22, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Fourteen Million Two Hundred Fifty Thousand Dollars ($14,250,000), consisting of three installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, or any portion thereof that has been deposited as an installment payment of the Settlement Amount, upon deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means The Aetna Casualty and Surety Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

1.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall, upon such payment, be exhausted by payment of such Settlement Amount, and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling

Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

2. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the

Settlement Agreement dated as of March 26, 1986 between The Aetna Casualty and Surety Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

2.1 *Definitions.* As used in this Paragraph and Paragraph 2.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means John-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
01 XN 1913 WCA	7/01/78 - 7/01/79
01 XN 2284 WCA	7/01/79 - 7/01/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of March 26, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Five Million Eight Hundred Thousand Dollars ($5,800,000).

"Settlement Fund" means the Settlement Amount upon deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means The Aetna Casualty and Surety Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

2.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the

Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall, upon such payment, be exhausted by payment of such Settlement Amount, and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and ail damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided,*

however, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

3. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 7, 1986 between AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, on the one hand, and Manville Corporation, et al., on the other hand, that:

3.1 *Definitions.* As used in this Paragraph and Paragraph 3.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Bond" means the Bond, dated October 8, 1986, issued by American Home Assurance company in favor of Manville Corporation and the JM Plaintiffs in connection with the Settlement Agreement.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated as of October 7, 1986, between the JM Plaintiffs and the Settling Insurers with respect to the JM Included Action.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Supe-

rior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers with respect to the Policies and the allegations and claims of the Settling Insurers against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as

amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurers to the JM Insureds:

Policy Number	Policy Periods (for information only)
Issued by AIU Insurance Company:	
75 100718	7/01/78 - 7/01/79
75 100719	7/01/78 - 7/01/79
75 101097	7/01/79 - 7/01/80
75 101098	7/01/79 - 7/01/80
Issued by Granite State Insurance Company:	
80 93032	7/01/76 - 7/01/77
80 93033	7/01/76 - 7/01/77
80 93260	7/01/77 - 7/01/78
80 93261	7/01/77 - 7/01/78
6179 1514	7/01/79 - 7/01/80
Issued by Lexington Insurance Company:	
GC 550 4610	7/01/75 - 7/01/76
GC 550 3055	7/01/76 - 7/01/77
GC 550 6117	7/01/77 - 7/01/78
551 1324	7/01/78 - 7/01/79
551 1483	7/01/79 - 7/01/80
Issued by National Union Fire Insurance Company of Pittsburgh, PA:	

Policy Number	Policy Periods (for information only)
118 5191	7/01/76 - 7/01/77
122 8559	7/01/77 - 7/01/78
122 8560	7/01/77 - 7/01/78
122 8561	7/01/77 - 7/01/78
123 1971	7/01/78 - 7/01/79
978 2326	7/01/79 - 7/01/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Policyholder Releases" means the releases to be executed by Manville Corporation on behalf of itself and each other JM Insured and their respective successors and assigns and by each of the JM Plaintiffs on behalf of itself and its successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit B.

"Settlement Agreement" means the Settlement Agreement dated as of October 7, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Forty-Four Million Four Hundred Thousand Dollars ($44,400,000).

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurers pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written

instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means any one of (i) AIU Insurance Company, (ii) Granite State Insurance Company, (iii) Lexington Insurance Company, and (iv) National Union Fire Insurance Company of Pittsburgh, PA.

"Settling Insurer Group" means the Settling Insurers and each of their respective present and former Affiliates and present, former and future directors, officers, and employees. The "Settling Insurer Group" of a Settling Insurer means the Settling Insurer and its present and former Affiliates and its present, former and future directors, officers and employees.

"Settling Insurer Release" means a release executed by a Settling Insurer on behalf of itself and its successors and assigns, substantially in the form attached to the Settlement Agreement as Exhibit C.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

3.2 *Orders.*

(A) The disposition of the Settlement Fund and the resolution of all disputes concerning the interpretation and enforcement of this Settlement Agreement, the Dismissal Agreement, the Bond, the Policyholder Releases and the Settling

Insurer Releases are subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurers of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurers and the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies (including but not limited to excess worker's compensation liability, property damage liability, general liability and any and all other liability), and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of the Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and

enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group;

(E) upon, payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, Manville Corporation and the JM Plaintiffs shall execute and deliver the Policyholder Releases to the Settling Insurers as provided in Paragraph 2(c)(ii) of the Settlement Agreement; and

(F) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

4. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 12, 1986, between American Re-Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

4.1 *Definitions.* As used in this Paragraph and Paragraph 4.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
M1050173	7/1/76 - 7/1/77
M1665370	7/1/77 - 7/1/78
EUR4000021	7/1/78 - 7/1/79

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 12, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Three Million Two Hundred Thousand Dollars ($3,200,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means American Re-Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the

plural form, and each defined term stated in a plural form shall include the singular form.

4.2 *Orders.*

(A) Unless and until the Settlement Agreement terminates, the disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any

suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the

JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

5. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 26, 1986, between Centaur Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

5.1 *Definitions.* As used in this Paragraph and Paragraph 5.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, but shall not include any governmental entity. As used herein, the term "governmental entity" shall include, but shall not be limited to, any municipal, local, state or federal liquidator, rehabilitator, or department of insurance. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Bonds" means the U.S. Treasury-backed zero coupon bonds, commonly known as "CATS" bonds, with a maturity date of February 15, 1989, and having an aggregate face value at maturity of $500,000, transferred to the Trust pursuant to Paragraph 2(a) of the Settlement Agreement.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now

known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation, dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means policy number CU 00203 (policy period July 1, 1979 - July 1, 1980) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of September 26, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Fund" means the Trust Property upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Centaur Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

"Trust" means the trust established pursuant to Paragraphs 2(a) and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trustee" means Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, and any successor thereto.

"Trust Agreement" means the Trust Agreement dated as of September 26, 1986, among the parties to the Settlement Agreement and the Trustee with respect to the terms and provisions governing the administration of the Trust.

"Trust Property" means (i) the Bonds, upon their transfer to the Trust, and any proceeds of the Bonds obtained by the Trustee, whether following maturity of the Bonds or otherwise; (ii) cash in the amount of $6,000 upon the transfer of such cash to the Trust as provided in Paragraph 2(a) of the Settlement Agreement; (iii) any amounts received by the Trust pursuant to Paragraphs 5(b) or 5(c) of the Settlement Agreement; and (iv) all gain and interest and other yield on the foregoing and the proceeds thereof; *provided*,

however, that "Trust Property" shall not include any of the foregoing to the extent that it is released to the Settling Insurer pursuant to Section 4(d) of the Trust Agreement.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

5.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall hereafter be released from any and all Policy Claims by any Person, and the Policy shall be exhausted by delivery by the Trustee of the Trust Property to the Clerk of this

Court and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon delivery by the Trustee of the Trust Property to (or in accordance with the written

instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

6. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 20, 1986, between Commercial Union Insurance Company and the Northern Assurance Company of America, on the one hand, and Manville Corporation, et al., on the other hand, that:

6.1 *Definitions.* As used in this Paragraph and Paragraph 6.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Boston Action" means Adversary Proceeding No. 82-1390, currently pending in the United States Bankruptcy Court for the District of

Massachusetts, originally filed as Civil Action No. 39329 in the Superior Court Department of the Commonwealth of Massachusetts in and for the County of Suffolk, in whatever forum it may hereafter reside.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Defendants" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation) and Johns-Manville International Corporation, each of which is a named defendant in the Boston Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers (or either of them) with respect to the Policies and the allegations and claims of the Settling Insurers (or either of them) against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante

Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means the following insurance policies issued by the Settling Insurers (or either of them) to the JM Insureds:

Policies	Policy Periods (for information only)
All insurance policies as determined by the jury in Phase I of JCP No. 1072, as set forth on Exhibit G-1 attached to the Settlement Agreement	1/1/34-7/1/45
0-312500	7/1/45-7/1/48
0-312501	7/1/45-7/1/48
0-334350	7/1/46-7/1/49
0-334351	7/1/46-7/1/51
S-10497 (on policy form ES9024-1, as determined by the jury in Phase I of JCP No. 1072, as set forth on Exhibit G-2 attached to the Settlement Agreement)	7/1/60-7/1/63

Policies	Policy Periods (for information only)
E16 8232-001	3/18/66-7/1/69
E16 8232-002	3/18/66-7/1/69
EY 8232-004	7/1/69-7/1/72
EY 8232-005	7/1/69-7/1/72

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 20, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Twenty-Seven Million One Hundred Thousand Dollars (U.S. $27,100,000), consisting of four installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurers pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurers" means Commercial Union Insurance Company, a Massachusetts corpora-

tion and the successor by merger to The Employers' Liability Assurance Corporation, Ltd.; and The Northern Assurance Company of America, a Vermont corporation and the successor to the obligations of The Employers' Surplus Lines Insurance Company (now known as Falcon Insurance Company) under Policy No. S-10497.

"Settling Insurer Group" means the Settling Insurers and each of their respective present and former Affiliates and present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

6.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurers of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurers and their Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be deemed exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers (or either of them) are excluded from this clause (D)); and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), all of the following: (i) the claims of the JM Plaintiffs and/or the JM Defendants against the Settling Insurers (or either of them) asserted or assertable in either the JM Included Action or

the Boston Action, and (ii) the JM Included Action itself.

7. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 21, 1986, between First State Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

7.1 *Definitions.* As used in this Paragraph and Paragraph 7.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling

Insurer with respect to the Policy and the allegations and claims of the Settling insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policy" means policy number 922992 (policy period 7/01/76 - 7/01/77) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of October 21, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means One Million Four Hundred Thousand U.S. Dollars (U.S. $1,400,000).

"Settlement Fund" means the Settlement Amount upon its transfer to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such transfer.

"Settling Insurer" means First State Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

7.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were

or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall hereafter be released from any and all Policy Claims by any Person, and the Policy shall be exhausted by the transfer of the Settlement Amount to (or in accordance with the instructions of) the Clerk of this Court and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)); and

(E) upon the transfer of the Settlement Amount (and any interest payable pursuant to Paragraph 2(e) of the Settlement Agreement) to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, uncondi-

tionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

8. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of March 27, 1986, between Gibraltar Casualty Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

8.1 *Definitions.* As used in this Paragraph and Paragraph 8.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means March 27, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Fed-

eral Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except nat-

ural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means insurance policy number GMX 00179 issued by the Settling Insurer to the JM Insureds for the policy period July 1, 1979 to July 1, 1980.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be,

asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of March 27, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means One Million Nine Hundred Thirty-Seven Thousand Five Hundred Dollars ($1,937,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Gibraltar Casualty Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

8.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been

assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policy (including, but not limited to, liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted

prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM included Action, and (ii) the JM Included Action itself.

9. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 18, 1985, between Highlands Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

9.1 *Definitions.* As used in this Paragraph and Paragraph 9.2-below, the following defined terms have the following meanings:

"Affiliate" of another Person means any parent organization, subsidiary organization, or any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limi-

tation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with the Bankruptcy Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means insurance policy number SR 20115 (policy period July 1, 1976 - July 1, 1977) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of September 18, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Two Million Six Hundred Thousand Dollars ($2,600,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Para-

graph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Highlands Insurance Company on behalf of itself and each of its Affiliates.

"Settling Insurer Group" means the Settling Insurer and its present or former Affiliates, and each of their present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

9.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the

Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D). all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and

enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

10. IT IS HEREBY FURTHER DETERMINED with respect to the Settlement Agreement dated as of January 29, 1985 between Insurance Company of North America, Midland Insurance Company and Allstate Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company"), on the one hand, and Manville Corporation, et al., on the other hand (all capitalized terms being used as defined in Paragraph 10.1 below), that:

(1) the Settling Insurers issued or are or may be responsible for the Policies and the Policies constitute and include property of the JM Debtors' estate;

(2) serious and substantial disputes have arisen between Manville Corporation, the Settling Insurers and others concerning the availability and extent of coverage and other obligations under the Policies;

(3) on March 31, 1980, the JM Plaintiffs commenced an action in the Superior Court of the

State of California, City and County of San Francisco, against the Settling Insurers and other insurers of the JM Insureds, which action has been coordinated with other suits in JCP No. 1072;

(4) prior to the filing of the JM Debtors' petition for reorganization under Chapter 11 of the Code on August 26, 1982, lawsuits on behalf of more than 16,000 persons had been filed against the JM Group and/or its insurers, including one or more of the Settling Insurers, claiming damages for asbestos-related claims, including (but not limited to) health, personal injury or property damage claims;

(5) no fewer than 6,000 additional lawsuits would have been commenced by January 1, 1984 against the JM Group and/or its insurers, but for the provisions of 11 U.S.C. § 362(a) and the orders of this Court issued pursuant to 11 U.S.C. §§ 362(a) and 105; and

(6) the settlement provided for in the Settlement Agreement is a fair and reasonable resolution of the disputes between Manville Corporation and the JM Plaintiffs and the Settling Insurers regarding the Policies, and approval of the Settlement Agreement will materially enhance the JM Debtors' ability to successfully and effectively reorganize under Chapter 11 of the Code.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of January 29, 1985, between Insurance Company of North America, Midland Insurance Company and All-

state Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company"), on the one hand, and Manville Corporation, et al., on the other hand, that:

10.1 *Definitions.* As used in this Paragraph and Paragraph 10.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Aggregate Limit of Liability" means (subject to increase or reinstatement in accordance with the provisions of Paragraph 5 of the Settlement Agreement) Thirty-Seven Million Dollars ($37,000,000) as to INA, Forty-Six Million Seven Hundred Fifty Thousand Dollars ($46,750,000) as to Midland and Twenty-Eight Million Fifty Thousand Dollars ($28,050,000) as to Allstate.

"Allstate" means Allstate Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company").

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" entered into by the parties to the

Settlement Agreement substantially in the form of Exhibit A thereto.

"Dismissals" means the Dismissals with Prejudice and the Dismissals Without Prejudice provided for in the Dismissal Agreement.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and (i) as to which no appeal, petition for hearing or rehearing or petition for certiorari is pending, or (ii) as to which no further appeal, petition for hearing or rehearing or petition for certiorari is permitted.

"INA" means Insurance Company of North America.

"JCP No. 1072" means Judicial Council Coordination Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM/Marsh Action.

"JM/Marsh Action" means all of the allegations and claims of the parties to *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.*, Docket No. 765226, and *Johns-Manville Corporation, et al. v. Marsh & McLennan, Incorporated, et al.*, Docket No. 787776, each of which is included in JCP No. 1072, and includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless

such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Employees" means present, former or future directors, officers and employees of one or more of the JM Insureds.

"JM Group" means the JM Insureds and the JM Employees.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers and the allegations and claims of the Settling Insurers against the JM Plaintiffs, or any other Settling Insurer; provided, however, that "JM Included Action" shall not include that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against Midland and the allegations and claims of Midland against the JM Plaintiffs relating to Midland Policy No. XL 147541 for the policy period July 1, 1979 - July 1, 1980.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means "Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Releases" means the releases to be executed by Manville Corporation and each of the JM Plaintiffs on behalf of themselves and each other JM Insured and their respective successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit B.

"Midland" means Midland Insurance Company.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 23, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurers to the JM Insureds:

Settling Insurer	Policy Number	Policy Periods (for information only)
INA	XCP 3530	3/18/66 - 7/01/69
	XCP 3628	7/01/69 - 7/01/72
Midland	XL 2184	3/03/72 - 7/01/72
	XL 2504 & XL 2505	7/01/72 - 7/01/75

Settling Insurer	Policy Number	Policy Periods (for information only)
Allstate	63 000 928	7/01/75 - 7/01/76
	63 001 943	7/01/76 - 7/01/77
	63 003 297	7/01/77 - 7/01/78
	63 003 298	7/01/77 - 7/01/78

provided, however, that the term "Policies" does not and shall not include any coverage which may exist in the above listed insurance policies for statutory workers' compensation, as referred to in Paragraph 8 of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of, or relating to, any or all of the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of January 29, 1985, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settling Insurer" means any one of (i) INA, (ii) Midland, and (iii) Allstate.

"Settling Insurer Group" means the Settling Insurers and their respective present, former or future directors, officers and employees. The "Settling Insurer Group" of a Settling Insurer means such Settling Insurer and its respective present, former or future directors, officers and employees.

"Settling Insurers" means INA, Midland, and Allstate.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

10.2 *Orders.*

(A) The Settlement Agreement is, in all respects, approved, and the execution, delivery and performance of the Settlement Agreement and certain other documents referred to therein (including, without limitation, the Dismissal Agreement, the Dismissals and the JM Releases) by Manville Corporation on behalf of itself and its Affiliates and by each of the JM Plaintiffs are hereby ratified and confirmed, and such parties are hereby authorized to execute and/or deliver such additional documents (as may be provided for in the Settlement Agreement) and do such things as may be necessary to perform, implement and effectuate the Settlement Agreement and this Order;

(B) at and after the date of this Order, each Settling Insurer as to which the Settlement Agreement has not been terminated shall have no duties or obligations to any Person based upon, arising out of or related to any or all the Policies, except as may be imposed by the Settlement Agreement;

(C) upon payment by any Settling Insurer as to which the Settlement Agreement has not been terminated of an aggregate amount equal to its Aggregate Limit of Liability in accordance with

the terms and provisions of the Settlement Agreement, such Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such performance be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group of any Settling Insurer as to which the Settlement Agreement has not been terminated (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are not so enjoined); and

(E) upon payment by any Settling Insurer as to which the Settlement Agreement has not been terminated of an amount equal to its Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the dismissal, unconditionally and with prejudice, of both: (i) the claims between the JM Plaintiffs, on the one hand, and such Settling Insurer, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action (with respect to such claims) itself, is hereby approved and authorized.

11. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of February 20, 1986, between INSCO Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

11.1 *Definitions.* As used in this Paragraph and Paragraph 11.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means February 20, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal

has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-

Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means policy number MLI 1309 (policy period July 1, 1979 - July 1, 1980) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of February 20, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Three Hundred Eighty-Seven Thousand Five Hundred Dollars ($387,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means INSCO Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

11.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members

of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policy (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order, a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause

of action; *provided, however*, that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

12. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 20, 1986, between International Surplus Lines Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

12.1 *Definitions*. As used in this Paragraph and Paragraph 12.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person.

The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided, and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer

against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation, or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"L/C Bank" means the issuer of the Letter of Credit or any renewal Letter of Credit obtained by the Settling Insurer pursuant to Paragraph 9(b) of the Settlement Agreement.

"Letter of Credit" means an irrevocable letter of credit, in substantially the form attached as Exhibit F to the Settlement Agreement, issued pursuant to Paragraph 9 of the Settlement Agreement, and any renewal thereof.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Second Amended and Restated Plan of Reorganization of Manville Corporation dated August 22, 1986, as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
XSI 5205	7/01/79 - 5/07/80
XSI 5206	7/01/79 - 5/07/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 20, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Two Million Dollars ($2,000,000)

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurer pursuant to Paragraph 5(b) or 5(c) of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or loses attributable thereto after any such deposit.

"Settling Insurer" means International Surplus Lines Insurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present and former Affiliates and present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

12.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the L/C Bank of the Settlement Amount to (or in accordance with the written instructions of) the Clerk of this Court in accordance with Paragraph 2(c) of the Settlement

Agreement, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final order, a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so

restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon delivery by the L/C Bank of the Settlement Amount to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

13. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 8, 1986, between the Settling Insurers (as defined in Paragraph 13.1 below), on the one hand, and Manville Corporation, et al., on the other hand, that:

13.1 *Definitions.* As used in this Paragraph and Paragraph 13.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person,

whether through the ownership of securities, by contract or otherwise.

"Business Day" means, (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Final Installment Payment" means Twenty-Six Million Eight Hundred Sixty Thousand Nine Hundred Nineteen Dollars (U.S. $26,860,919), due and payable on the Final Payment Date.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"Final Payment Date" means the second anniversary of the First Payment Date, or, if such second anniversary is not a Business Day, then the first Business Day thereafter.

"First Payment Date" means the later of (i) July 1, 1987, and (ii) the ninetieth day following the Plan Confirmation Date or, if such ninetieth day is not a Business Day, then the first Business Day thereafter.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Litigant Settling Insurer Parties with respect to certain of the Policies and the allegations and claims of the Litigant Settling Insurer Parties against the JM Plaintiffs with respect to those Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Litigant Settling Insurer Parties" means those Settling Insurer Parties that are defendants in the JM Included Action, as indicated on Exhibit I to the Settlement Agreement.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other

entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following listed insurance policies (and only the following insurance policies) issued by the Settling Insurer Parties to the JM Insureds, as such policies may be modified, amended or supplemented to the date of the Settlement Agreement:

Policy Number	Policy Periods (for information only)
UKL 1177	July 1, 1978 - July 1, 1980
UKL 1178	July 1, 1978 - July 1, 1980
UKL 1179	July 1, 1978 - July 1, 1979
UKL 1180	July 1, 1978 - July 1, 1980
UKL 1181	July 1, 1978 - July 1, 1979
ULL 0931	July 1, 1979 - July 1, 1980
ULL 0932	July 1, 1979 - July 1, 1980
ULL 1218	July 1, 1979 - July 1, 1980
UMA 0476	July 1, 1980 - July 1, 1983
UMA 0477	July 1, 1980 - July 1, 1981
UMA 0478	July 1, 1980 - July 1, 1981
UMA 0479	July 1, 1980 - July 1, 1981

Policy Number	Policy Periods (for information only)
UNA 0412	July 1, 1980 - July 1, 1983
UNA 0413	July 1, 1980 - July 1, 1983
UNA 0414	July 1, 1981 - July 1, 1983

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement: Agreement" means the Settlement Agreement dated as of September 8, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Sixty-Two Million One Hundred Seventy-Six Thousand Five Hundred Fifty-Six Dollars (U.S. $62,176,556), consisting of three installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, together with all amounts paid by the Settling Insurer Parties pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement and the Trust Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer Group" means the Settling Insurer Parties and their respective present or

former Affiliates and each of their present, former and future directors, officers, stockholders (in their capacity as such), members, members' agents, insurance underwriters, and employees.

"Settling Insurer Party" means (i) any company or corporation (as presently or previously constituted) or any syndicate of Lloyd's of London (including each member of such syndicate as such syndicate is presently or was previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies (including each Litigant Settling Insurer Party), and (ii) any company, corporation, syndicate or other entity which is listed on the signature pages to the Settlement Agreement by reason of being a successor, assignee or otherwise of a Settling Insurer Party; *provided, however,* that none of Pacific & General Insurance Company, Limited, Mentor Insurance Company (United Kingdom) Limited and Compania Agricola de Seguros is a "Settling Insurer Party" for purposes of the Settlement Agreement.

"Settling Insurers" means Allianz Versicherungs Aktiengesellschaft, Assicurazioni Generali Di Trieste E Venezia S.P.A, Bellefonte Insurance Company, Bermuda Fire & Marine Insurance Company Ltd., Chemical Insurance Company Ltd., CNA Reinsurance of London Ltd., Dart Insurance Company Ltd., Dominion Insurance Company Ltd., Eisen Und Stahl Ruckversicherungs Aktiengesellschaft, El Paso Insurance Company Ltd., INSCO Ltd., La Preservatrice Compagnie Anonyme d'Assurances Contres Les Accidents L'Incendie et Les Risques Divers, Le Assicurazioni D'Italia Societa Per Azioni, Mutual Reinsurance Com-

pany Ltd., Nisshin Fire & Marine Insurance Company Ltd., North Atlantic Insurance Company Limited, Reaseguradora Nacional De Venezuela Compania Anonima, Royale Belge I.R. S.A. D'Assurances, St. Katherine Insurance Company Ltd., Stronghold Insurance Company Ltd., Union Atlantique D'Assurances S.A., Walbrook Insurance Company, Ltd., "Winterthur" Swiss Insurance Company, Yasuda Fire & Marine Insurance Company (UK) Ltd., British National Life Insurance Society Ltd., Brittany Insurance Company Ltd., Bryanston Insurance Company Ltd., Compagnie Europeene D'Assurances Industrielles S.A., Groupe Josi Re, International Insurance Company, Latino Americana De Reaseguros, Louisville Insurance Company Ltd., and the following Underwriting Syndicates, Lloyd's of London (including the underwriting members thereof): 99, 126, 175, 219, 231, 235, 278, 279, 365, 408, 518, 553, 618, 653, 661, 701, 799, 918, 948 and 989.

"Trust" means the trust established pursuant to Paragraphs 2 and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trust Agreement" means the Trust Agreement dated as of September 8, 1986, between the parties to the Settlement Agreement and the Trustee with respect to the terms and provisions governing the administration of the Trust.

"Trustee" means The Colorado National Bank of Denver, a national banking association, the trustee under the Trust Agreement, and any successor thereto.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

13.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred and shall attach solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, the Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies, and shall be released from any and all Policy Claims by any Person, and the Policies shall hereafter be deemed exhausted and shall hereupon be null and void and of no further force or effect as to any member of the Settling Insurer Group;

(D) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims asserted by any party to JCP No. 1072 against the Litigant Settling Insurer Parties that are unrelated to Policy Claims are excluded from this clause (D); and

(E) promptly after the Final Payment Date, and provided that no member of the Settling Insurer Group shall have attempted to prevent the Trustee from paying the Final Installment Payment to the Clerk of this Court in accordance with the Trust Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice, both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer Group asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

14. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 10, 1986, between Marsh & McLennan, Incorporated and Marsh & McLennan, Limited, on the one hand, and Manville Corporation, et al., on the other hand, that:

14.1 *Definitions.* As used in this Paragraph and Paragraph 14.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof, the rate determined on the first Business Day of such period equal to the per annum discount rate for the most recently auctioned one-year U.S. Treasury Bills, as published by the Board of Governors of the Federal Reserve System, plus one percent (1%).

"Business Day" means (i) with respect to deposits with, or wire transfers to, this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City or Pittsburgh, Pennsylvania are authorized by law to close.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated October 10, 1986, between the JM Plaintiffs and Marsh.

"Effective Date" means October 10, 1986.

"E&O Release" means a release executed by Manville Corporation and by the JM Plaintiffs, substantially in the form attached as Exhibit B to the Settlement Agreement, and delivered to the Trustee.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, the territories of the United States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"Funding Date" means the later of (i) January 1, 1987 and (ii) the fifth Business Day following the first date on which both this Order becomes a Final Order and the Plan Confirmation Date has occurred.

"Home Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against their insurers, and the allegations and claims by their insurers against the JM Plaintiffs, instituted on March 31, 1980 in the Superior Court of the State of California, City and County of San Francisco, entitled *Johns-Manville Corporation, et al., v. the Home Insurance Company, et al.*, Docket No. 765226.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Actions.

"JM Group" means any or all of the JM Insureds and the present, former and future

directors, officers and employees of each of one or more JM Insured.

"JM Included Actions" means the Home Action and the Marsh Action.

"JM Insureds" means any or all of Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means any or all of Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Release" means a release executed by Manville Corporation and by the JM Plaintiffs, substantially in the form attached as Exhibit D to the Settlement Agreement, and delivered to the Trustee.

"JM Responsible Entity" means the Persons which are (or, on or after the Plan Confirmation Date, the Person or Persons which will. be, under the Plan (or pursuant to an order of this Court)) liable for asbestos-related claims (including, without limitation, health, personal injury or property damage claims) involving any or all JM Insureds. As of the date hereof, the JM Responsible Entity is designated under the Plan as the "Trust" and the "PD Trust".

"Marsh" means both Marsh & McLennan, Incorporated, a Delaware corporation, and Marsh & McLennan, Limited, a Canadian corporation.

"Marsh Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against Marsh, and the defenses of Marsh against the JM Plaintiffs, instituted on November 28, 1981 in the Superior Court of the State of California, City and County of San Francisco, entitled *Johns-Manville Corporation, et al., v. Marsh & McLennan, Incorporated, et al.*, Docket No. 787776.

"Marsh Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against the Marsh Group based upon, arising out of or relating to services (whether acts or omissions) performed by the Marsh Group for the JM Group, at any time, in connection with insurance policies issued to or for the benefit of any of the JM Group (other than insurance policies issued to any individual member of the JM Group which were not issued in connection with such member's employment by the JM Insureds), including, without limitation, the negotiation, placement and securing of such policies, and attempts to receive the proceeds of, as well as the application for, advice concerning and any claims asserted under, such policies.

"Marsh Group" means any or all of Marsh and its present or former Affiliates, and each of their present, former and future directors, officers, and employees.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Settlement Agreement" means the Settlement Agreement dated as of October 10, 1986, between Marsh, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Twenty-Nine Million Seven Hundred Fifty Thousand U.S. Dollars (U.S. $29,750,000) plus interest, if any, accrued thereon at the Applicable Rate for (i) initially, the one-year period (or portion thereof) commencing on January 1, 1987 and ending on December 31, 1987 or the Funding Date, whichever is earlier, and (ii) thereafter, if the Funding Date has not occurred, for each one-year period (or portion thereof) commencing on the last day of the preceding one-year period and ending one year thereafter or on the Funding Date, whichever is earlier, such interest to be computed on the basis of a 365-day year for the actual days elapsed.

"Settlement Fund" means the Settlement Amount upon its transfer to the Trustee in accordance with the provisions of Paragraph 2 of the Settlement Agreement, all investment income thereon and gains or losses attributable thereto

after such deposit, and any interest paid in accordance with Paragraph 2(f) of the Settlement Agreement, minus any amounts paid to Manville Corporation or Marsh pursuant to Paragraph 11 of the Settlement Agreement.

"Transferred Settlement Fund" means that portion of the Settlement Fund which has been deposited with (or in accordance with the written instructions of) the Clerk of this Court.

"Trust Agreement" means the trust agreement dated October 10, 1986 among Marsh, Manville Corporation, the JM Plaintiffs and the Trustee.

"Trustee" means Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, or any successor trustee thereunder.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

14.2 *Orders.*

(A) The disposition of the Transferred Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to Marsh Claims, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to Marsh Claims which were or are assessable or assertable by any Person against any or all members of the Marsh Group are transferred, and

shall attach, solely to the Transferred Settlement Fund;

(C) commencing on the Effective Date, the Marsh Group shall have no further duties or obligations based upon, arising out of or related to Marsh Claims other than those set forth in the Settlement Agreement, the Dismissal Agreement and the Trust Agreement;

(D) commencing on the Plan Confirmation Date, all Persons, except Marsh, are restrained and enjoined from commencing and/or continuing any action, suit, arbitration or other proceeding of any type or nature against the Marsh Group based upon, arising out of, or related to Marsh Claims;

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice, both (i) the claims of the JM Plaintiffs against Marsh asserted or assertable in the Marsh Action, and (ii) the Marsh Action itself; and

(F) the JM Responsible Entity shall be deemed to be an assignee of Manville Corporation in Manville Corporation's capacity as releasor under the JM Release and the E&O Release.

15. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 22, 1985, between Peerless Casualty Company (now known as Peerless Insurance Company), on the one hand, and Manville Corporation, et al., on the other hand, that:

15.1 *Definitions.* As used in this Paragraph and Paragraph 15.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means May 22, 1985.

"Escrow Account" means an escrow account administered pursuant to the Escrow Agreement, with a banking institution satisfactory to the JM Plaintiffs.

"Escrow Agent" means the banking institution which is the escrow agent under the Escrow Agreement.

"Escrow Agreement" means the agreement dated as of May 22, 1985 entered into by the parties to the Settlement Agreement and, the Escrow Agent with respect to the terms and provisions governing the administration of the Escrow Account.

"Escrow Property" means the Settlement Amount upon its deposit in the Escrow Account, together with any payment deposited in the

Escrow Account in accordance with Paragraph 5(b) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after such deposits, until release of such payments and interest income from the Escrow Account.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former or future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer and the allegations and claims of the Settling Insurer against the JM Plaintiffs.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies issued by the Settling Insurer to the JM

Insureds: Policy Nos. 619, 829, 930, 1-245 and 1-010.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 22, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means $1,300,000, consisting of two installment payments of $800,000 on the Effective Date, and $500,000 on or before March 3, 1986.

"Settlement Fund" means the Escrow Property upon its release (other than because of termination of the Settlement Agreement in accordance with its terms) from the Escrow Account in accordance with the provisions of the Escrow Agreement, and all investment income thereon and gains or losses attributable thereto after such release.

"Settling Insurer" means Peerless Casualty Company, now known as Peerless Insurance Company, on behalf of itself and each of its Affiliates.

"Settling Insurer Group" means the Settling insurer and its present or former Affiliates, and present, former or future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the

plural form, and each defined term stated in a plural form shall include the singular form.

15.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon the release (other than because of the termination of the Settlement Agreement in accordance with its terms) of the Escrow Property from the Escrow Account pursuant to the terms of the Settlement Agreement and the Escrow Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such release be exhausted by virtue of such release and shall thereupon be null and void and of no further force or effect;

(D) upon the release (other than because of the termination of the Settlement Agreement in accordance with its terms) of the Escrow Property from the Escrow Account pursuant to the terms of the Settlement Agreement and the Escrow Agreement, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

16. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the

Settlement Agreement dated as of March 27, 1986, between Prudential Reinsurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

16.1 *Definitions*. As used in this Paragraph and Paragraph 16.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 et *sec.*, as amended.

"Effective Date" means March 27, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such

judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM

Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
DXC 90 1143	7/01/76 - 7/01/77
DXC DX 0308	7/01/77 - 7/01/78
DXC DX 1109	7/01/78 - 7/01/79

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all mem-

bers of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of March 27, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Seven Million Nine Hundred Thirty-Seven Thousand Five Hundred Dollars ($7,937,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Prudential Reinsurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

16.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with

respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policies (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final

Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

17. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 28, 1986, between Puritan Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

17.1 *Definitions.* As used in this Paragraph and Paragraph 17.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means May 28, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
ML 65 0094	7/01/76 - 7/01/77
ML 65 0313	3/01/77 - 7/01/77
ML 65 0355	7/01/77 - 7/01/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 28, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Seven Million Five Hundred Thousand Dollars ($7,500,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Puritan Insurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

17.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise

based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policies (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to pol-

icy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

18. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of April 24, 1986, between Reliance Insurance Company (on behalf of itself and as successor in interest to Standard Accident Insurance Company), on the one hand, and Manville Corporation, et al., on the other hand, that:

18.1 *Definitions.* As used in this Paragraph and in Paragraph 18.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof during the period from April 1, 1986 to the Payment Date, the rate determined on April 1 of each calendar year, or the first Business Day thereafter, commencing April 1, 1986, equal to the most recently auctioned per annum market discount rate for fifty-two week U.S. Treasury bills, as published by the Board of Governors of the Federal Reserve System, plus one-half of one percent (1/2%).

"Business Day" means (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Settling Parties and the present, former and future directors, officers and employees of each of one or more of the JM Settling Parties.

"JM Included Action" means that portion of JCP No. 1072 represented by all of the allegations and claims of the JM Plaintiffs against the Settling Insurer and all of the allegations and

claims of the Settling Insurer against the JM Plaintiffs.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Settling Parties" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"Payment Date" means three (3) Business Days after receipt by the Settling Insurer of notice from Manville Corporation pursuant to Paragraph 2(c) of the Settlement Agreement that the Plan Confirmation Date has occurred.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means all policies which are at issue in the JM Included Action issued by Standard Accident Insurance Company, to whom Reliance Insurance Company is the successor in interest, and any other third party liability policy heretofore alleged or which may hereafter be alleged to have been issued by the Settling Insurer to Johns-Manville Corporation or any of the JM Settling Parties at any time.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of April 24, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Five Hundred Ninety-Two Thousand Six Hundred Forty-Five Dollars ($592,645), plus interest accrued thereon at the Applicable Rate from (and including) April 1, 1986 until (and excluding) the Payment Date.

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2(c) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Reliance Insurance Company, on behalf of itself and as successor in interest to Standard Accident Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present and former Affiliates, and each of their present, former and future directors, officers, and employees.

"Settling Insurer Release" means a Release to be executed by the Settling Insurer on behalf of itself and its successors and assigns, substantially in the form attached as Exhibit C to the Settlement Agreement.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

18.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii)

asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon execution and delivery of the Settling Insurer Release in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

19. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 21, 1985, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

19.1 *Definitions.* As used in this Paragraph and Paragraph 19.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person; *provided, however*, that any reference to "Affiliates" of Manville Corporation, the JM Debtors or the JM Insureds shall not be deemed to include Rocky Mountain International Insurance Ltd. The term "controlling" (including, with correla-

tive meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Business Day" means any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Payment Date" means the fifth Business Day immediately following the Plan Confirmation Date, or such other later day as the parties may agree.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other

entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means insurance policy nos. 029003(77) (policy period July 1, 1977 - July 1, 1978) and 029004(78) (policy period July 1, 1978 - July 1, 1979), and only these policies, issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 21, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means the sum of (i) Fourteen Million Two Hundred Seventy Thousand Dollars ($14,270,000) plus all accrued and unpaid interest thereon as of each December 31,

commencing December 31, 1985 (such aggregate amount, the "Base Amount") plus (ii) interest on the Base Amount, calculated on the basis of a 365-day year, accrued from July 1, 1985 until and including the Payment Date at a rate per annum, for each 6-month period or portion thereof commencing July 1, 1985, equal to the 6-month LIBOR as published in the Wall Street Journal on the first Business Day of such 6-month period.

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Rocky Mountain International Insurance Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

19.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests

based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in

connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

20. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 10, 1986, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

20.1 *Definitions.* As used in this Paragraph and Paragraph 20.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person;

provided, however, that any reference to "Affiliates" of Manville Corporation, the JM Debtors or the JM Insureds shall not be deemed to include Rocky Mountain International Insurance Ltd. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Aggregate Limit of Liability" means (subject to increase or reinstatement in accordance with the provisions of Paragraph 5 of the Settlement Agreement) one million dollars ($1,000,000).

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, the territories of the United States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for hearing, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Coordination Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.),

each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means the following insurance policy (and only the following insurance policy) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
29002	7/1/77-7/1/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of, or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of October 10, 1986, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand.

"Settling Insurer" means Rocky Mountain International Insurance Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form and each defined term stated in a plural form shall include the singular form.

20.2 *Orders.*

(A) Unless and until the Settlement Agreement terminates, at and after the date of this Order, the Settling Insurer shall have no duties or obligations to any Person based upon, arising out of or related to the Policy except as may be imposed by the Settlement Agreement;

(B) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurer of the Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall, upon such payment, be exhausted by payment of such amount and shall thereupon be null and void and of no further force or effect;

(C) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (C)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(D) upon payment by the Settling Insurer of an amount equal to the Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall

otherwise be terminated in accordance with its terms), both of the following: (i) the claims between the JM Plaintiffs, on the one hand, and the Settling Insurer, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action (with respect to such claims) itself.

21. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 22, 1986, between Royale Belge, on the one hand, and Manville Corporation, et al., on the other hand, that:

21.1 *Definitions.* As used in this Paragraph and Paragraph 21.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with") as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco.

"JM Group" means the JM Insureds and the present, former and future directors, officers and

employees of each of one or more of the JM Insureds.

"JM Insureds" means Manville Corporation, Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.), Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), and each other Person (except natural persons) who is an Affiliate of Manville Corporation and Johns-Manville Corporation.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means Royale Beige policy no. UPA 0273 (policy dates 7/01/82 to 7/01/83) and policy no. 1 251 223/81 (policy dates 7/01/81 to 7/01/82) issued by the Settling Insurer to the JM Insureds, as such policies may be modified, amended or supplemented to the date of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 22, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Four Hundred Seventy Five Thousand Dollars (U.S. $475,000).

"Settlement Fund" means the Settlement Amount, together with all amounts paid by the Settling Insurer pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement and the Trust Agreement, and all investment income thereupon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Royale Belge.

"Settling Insurer Group" means the Settling Insurer and its respective present or former Affiliates and each of their present, former and future directors, officers, stockholders (in their capacity as such), members, members' agents, insurance underwriters, and employees.

"Trust" means the trust established pursuant to Paragraphs 2 and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trust Agreement" means the trust agreement dated as of October 22, 1986 entered into by the parties hereto and Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, with respect to the terms and provisions governing the administration of the Trust.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

21.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out or, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, the Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies, and shall be released from any Policy Claims by any Person and the Policies shall, upon deposit of the Settlement Amount with (or in accordance with the written instructions of) the Clerk of this Court, be deemed exhausted and shall thereupon be null and void and of no further force or effect as to any member of the Settling Insurer Group; and

(D) unless and until the Settlement Agreement terminates in accordance with the express pro-

visions thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims asserted by any party to JCP No. 1072 against the Settling Insurer that are unrelated to Policy Claims are excluded from this clause (D)).

22. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of April 23, 1986, between Sun Insurance Office, Limited, the London Assurance, and Sun Alliance Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

22.1 *Definitions.* As used in this Paragraph and Paragraph 22.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, and includes any Person (except natural persons) referred to in the Policies by the word "Affiliated." The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Allied" means any Person (except natural persons) referred to in the Policies by the word "Allied."

"Applicable Rate" means for each three-month period commencing on and including April 15, 1986 to and excluding the Payment Date (unless the interest accrual period is extended pursuant to Paragraph 2(i) of the Settlement Agreement), the rate determined on the first Business Day of such period equal to the per annum market discount rate for the most recently auctioned thirteen-week U.S. Treasury Bills, as published by the Board of Governors of the Federal Reserve System and quoted in the "Money Rates" column of the Wall Street Journal.

"Business Day" means (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer Group with respect to the Policies and the allegations and claims of the Settling Insurer

Group against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is a Subsidiary, Allied or Affiliate of Manville Corporation or Johns-Manville Corporation, and includes Canadian Johns-Manville Company Limited, sometimes referred to as Canadian Johns-Manville Co. Ltd., and any Allied, Affiliate or Subsidiary in which it has or had an interest, or any insured (except natural persons) as defined in the Policies.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072 and Johns-Manville Canada Inc., the named plaintiff in the Ontario Action.

"Ontario Action" means the judicial proceeding entitled *Johns-Manville Canada, Inc. v. Sun Alliance Insurance Company, Sun Insurance Office Limited, and The London Assurance*, Action No. 45279/79, presently pending in the Supreme Court of Ontario, in the municipality of Metropolitan Toronto, in the Province of Ontario, Canada.

"Payment Date" means seven (7) Business Days after Manville Corporation delivers the notice and a copy of the Order provided for in Para-

graph 2(d) of the Settlement Agreement to the Settling Insurer Group.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means the following insurance policies (and only the following insurance policies) issued by Sun Insurance Office, Limited to the JM Insureds:

Policy Number	Policy Periods (for information only)
65 014	4/01/46 - 4/01/49
65 050	4/01/49 - 4/01/52
65 087	4/01/52 - 7/01/52
65 088	7/01/52 - 7/01/55
65 5115	7/01/55 - 7/01/58
65 8543	7/01/58 - 7/01/61
65 11550 (and renewal renewal numbers GRS 58011 and GRS 78063 to Policy Number 65 11550)	7/01/61 - 7/01/70

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of April 23, 1986 between

the Settling Insurer Group, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means the sum of (i) Twenty-Seven Million Two Hundred Fifty Thousand United States Dollars (U.S. $27,250,000) (the "Base Amount") and (ii) interest, compounded quarterly, on the Base Amount at the Applicable Rate for the period commencing on and including April 15, 1986 and to but excluding the Payment Date.

"Settlement Fund" means the Settlement Amount, together with any interest payable pursuant to Paragraph 2(i) of the Settlement Agreement, upon the deposit thereof with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2(e) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurers" means Sun insurance office, Limited and The London Assurance.

"Settling Insurer Group" means the Settling Insurers and Sun Alliance Insurance Company.

"Subsidiary" means any Person (except natural persons) referred to in the Policies by the word "Subsidiary."

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

22.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court:

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall hereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon payment of the Settlement Amount, be exhausted by payment of such amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against

the Settling Insurers are excluded from this clause (D)); and

(E) upon payment of the Settlement Amount and any interest payable pursuant to Paragraph 2(i) of the Settlement Agreement in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer Group asserted or assertable in the JM Included Action and the Ontario Action, and (ii) the JM Included Action and the Ontario Action themselves.

23. IT IS HEREBY DETERMINED with respect to the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties (all capitalized terms being used as defined in Paragraph 23.1 below), on the one hand, and Manville Corporation, et al., on the other hand, that:

(1) The Settling Insurer Parties issued or are or may be responsible for the Policies and the Policies constitute and include property of the JM Debtors' estate;

(2) serious and substantial disputes have arisen among Manville Corporation, the Settling Insurer Parties and others concerning the availability and extent of coverage and other obligations under the Policies;

(3) on March 31, 1980, the JM Plaintiffs commenced an action in the Superior Court of the State of California, for the City and County of

San Francisco, against the Settling Insurer Parties and other insurers of the JM Insureds, which action has been coordinated with other suits in JCP No. 1072;

(4) prior to the filing of the JM Debtors' petition for reorganization under Chapter 11 of the Code on August 26, 1982, lawsuits on behalf of more than 16,000 persons had been filed against the JM Group and/or its insurers, including one or more of the Settling Insurer Parties, claiming damages for asbestos-related claims, including (but not limited to) health, personal injury or property damage claims;

(5) no fewer than 6,000 additional lawsuits would have been commenced by January 1, 1984 against the JM Group and/or its insurers, but for the provisions of 11 U.S.C. 362(a) and the orders of this Court issued pursuant to 11 U.S.C. 362(a) and 105; and

(6) the settlement provided for in the Settlement Agreement is a fair and reasonable resolution of the disputes between Manville Corporation and the JM Plaintiffs and the Settling Insurer Parties regarding the Policies, and approval of the Settlement Agreement will materially enhance the JM Debtors' ability to successfully and effectively reorganize under Chapter 11 of the Code.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties, on the one hand, and Manville Corporation, et al., on the other hand, that:

23.1 *Definitions.* As used in this Paragraph and Paragraph 23.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, and shall include a Subsidiary. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof, the rate determined on the first Business Day of such period equal to the most recently auctioned per annum market discount rate for one-year U.S. Treasury bills, as published by the Board of Governors of the Federal Reserve System, plus one (1%) percent.

"British Company" means (i) any company or corporation (as presently or previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement and (ii) any company, corporation or other entity which is a party to the Settlement Agreement by reason of being successor, assignee or otherwise of a British Company and which is so listed on the signature pages of the Settlement Agreement.

"Business Day" means any day except a Saturday, Sunday or other day on which commercial

banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated July 18, 1984, entered into by the parties to the Settlement Agreement with respect to the JM Included Action.

"Dismissals" means the Dismissals With Prejudice and the Dismissals Without Prejudice provided for in the Dismissal Agreement.

"Effective Date" means July 18, 1984.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a peti-

tion for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Employees" means present, former or future directors, officers and employees of one or more JM Insureds.

"JM Group" means the JM Insureds and the JM Employees.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers and the allegations and claims of the Settling Insurers against the JM Plaintiffs.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada, Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada, Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Releases" means the releases to be executed by Manville Corporation and each of the JM Plaintiffs on behalf of themselves and each other JM Insured and their respective successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit C.

"Lloyd's Syndicate" means (i) any syndicate of Lloyd's of London (including each member thereof

as such syndicate is presently or was previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement and (ii) any syndicate or entity which is a party to the Settlement Agreement by reason of being a successor, assignee or otherwise of a Lloyd's Syndicate and which is so listed on the signature pages thereof.

"Payment Date" means the later of (i) December 31, 1985 and (ii) the fifth Business Day immediately following the Plan Confirmation Date, or such other later day as the parties may agree.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof and any Person who presently has or in the future might have asbestos-related claims (including, without limitation, health, personal injury or property damage claims) against any or all members of the JM Group or against any or all members of the Settling Insurer Group.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the insurance policies listed in and the documents attached to the Settlement Agreement in Exhibits A-1, A-2 and A-3, in each case as may be addressed, modified, amended or supplemented; *provided, however,* that the term "Policies" does not and shall not include (i) that portion of, or the coverage provided under, any such policy or agreement issued by The Travelers Indemnity Company or any of its Affiliates providing workers' compensation or similar protection (a "Travelers WC Policy"), but only to the extent that such portion or coverage relates to claims which cannot be settled, compromised or otherwise resolved under applicable law or (ii) that portion of, or the coverage provided under, any Travelers WC Policy under which an award or other payment was being made as of the date of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means, with respect to each Settling Insurer Party, an amount equal to (1) the sum of (a) the amount. set forth opposite its name on the signature pages to the Settlement Agreement *plus* (b) the sum of the amounts (calculated as set forth in the next sentence) for (i) initially, the one-year period (or portion thereof) commencing on January 1, 1986 and ending on December 31, 1986 or the Payment Date, whichever is earlier, and (ii) thereafter, for each one-year period (or portion thereof) commencing on the last day of the preceding one-year period and ending one year thereafter or on the Payment Date, whichever is earlier, minus (2) on a dollar-for-dollar basis, the aggregate amount of any payments made by such Settling Insurer Party during the period from and including the Effective Date to and including the Payment Date for which such Settling Insurer Party is entitled to indemnification pursuant to Paragraph 5 of the Settlement Agreement. The amounts referred to in clause (b) above shall be calculated as follows: (1) for the period referred to in subclause (i) above, the Applicable Rate per annum on the amount referred to in clause (a) above for the period from (and including) January 1, 1986 to (but excluding) the last day of such period and (2) for each succeeding period referred to in subclause (ii) above, the Applicable Rate per annum on the sum of the amount referred to in clause (a) above and each other amount calculated pursuant to this sentence for each prior period calculated pursuant to subclause (ii) for the period, from (and including) the first day of such

period to (but excluding) the last day of such period.

"Settlement Fund" means the aggregate of all Settlement Amounts deposited with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and after such deposit all investment income thereon and gains or losses attributable thereto.

"Settling Insurer Group" means the Settling Insurers and their respective present or former Affiliates, and present, former or future directors, officers, stockholders (in their capacity as such), managing agents, members, members' agents, insurance underwriters and employees. The "Settling Insurer Group" of a Settling Insurer Party means the members of the Settling Insurer Party and their respective present or former Affiliates, and present, former or future directors, officers, stockholders (in their capacity as such), managing agents, members, members' agents, insurance underwriters and employees; *provided,* that, for purposes of this definition only, the Settling Insurer Party composed of Lloyd's Syndicates and British Companies shall also include all Lloyd's Syndicates and British Companies which are or are alleged to be subscribing insurers to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement.

"Settling Insurer Party" means any one of The Travelers Indemnity Company on behalf of itself and its Affiliates; The Home Insurance Company on behalf of itself and its Affiliates; the following Lloyd's Syndicates (including the underwriting

members thereof): 15, 16, 33, 48, 53, 56, 69, 90, 92, 108, 109, 112, 130, 131, 164, 204, 210, 211, 212, 219, 235, 250, 283, 297, 311, 316, 334, 347, 365, 373, 417, 422, 427, 431, 433, 440, 448, 458, 469, 472, 484, 490, 499, 507, 517, 555, 576, 581, 583, 604, 605, 620, 634, 637, 650, 652, 660, 665, 674, 677, 707, 755, 763, 768, 791, 800, 819, 845, 849, 884, 896, 917, 947, 964, 975, 989, 990 and 998; the following Lloyd's Syndicates (as such syndicate number was used at the time such syndicate allegedly subscribed to one or more of the Policies identified on Exhibit A-3 to the Settlement Agreement, and including the underwriting members thereof): 36, 57, 86, 88, 110, 151, 169, 174, 188, 194, 208, 214, 223, 233, 238, 274, 286, 300, 301, 315, 317, 371, 397, 405, 420, 425, 463, 470, 475, 476, 479, 531, 596, 598, 621, 629, 651, 656, 687, 688, 711, 713, 729, 748, 761, 767, 793, 795, 796, 797, 838, 851, 857, 867, 870, 900, 905 and 987; and the following British Companies: Andrew Weir Insurance Company Limited (as well as A. Weir, A. Weir Marine and Andrew Weir), British Aviation Insurance Company Limited (as well as BAIC), City General Insurance Company Limited (as well as City General), The Dominion Insurance Company Limited (as well as CF & AU, CF & AU Group H, Anglo-Saxon Insurance Association Limited, London & Edinburgh Insurance Company and Vanguard Insurance Company Limited), Eagle Star Insurance Company Limited (Aviation) (as well as Eagle Star, Eagle Star Aviation and Eagle Star Aviation A/C), English & American Insurance Company Limited (Non-Marine) (as well as E&A and E&A Non-Marine), English & American Insur-

ance Company Limited (Marine) (as well as E&A Marine and Economic), Excess Insurance Company Limited (as well as Excess and Excess A), The Lombard Elizabethan Insurance plc (as well as Lombard, Lombard Insurance Company Limited and Lombard Marine & General Insurance Company Limited), London Guaranty and Reinsurance Co. Limited (as well as Southern and Southern Insurance Company Limited), Orion Insurance Company plc (as well as Orion, Orion "T", Orion "T" A/C, Orion "T" A/C Aviation, Orion T Aviation A/C, Orion Group Aviation, Orion Group Aviation A/C, Orion Group Aviation Account, Orion/Drake/Sphere/New India Group Aviation A/C, Orion Drake Sphere New India Group Aviation A/C, Orion Drake Sphere Aviation, Orion "T" Marine A/C, Orion Non-Marine, Orion N/M, Orion N/M A/C, Orion (Non-Marine Account), Drake Insurance Company Limited, Sphere Insurance Company Limited, New India Assurance Company Limited and Orion Insurance Company Limited), Provincial Insurance plc (as well as Hull U/Rs Assen., Hull Uwrs. Assocn. A. Account, Hull Underwriters Association Limited, London Overseas A Account, London & Overseas Insurance Company Ltd. A Account and London & Overseas Insurance Company Limited), Prudential Assurance Company Limited (as well as Prudential and Prudential (City)), United Standard Insurance Company Limited (as well as United Standard), World Auxiliary Corporation Limited (as well as World Auxiliary, W. Aux. and W. Auxiliary).

"Subsidiary" of any Person means any corporation or other entity of which securities or voter

ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions is at the time owned directly or indirectly by such Person or one or more of its Subsidiaries or by such Person or one or more of its Subsidiaries.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

23.2 *Orders.*

(A) The Settlement Agreement is, in all respects, approved, and the execution, delivery and performance of the Settlement Agreement and certain other documents referred to therein (including, without limitation, the Dismissal Agreement, the Dismissals and the JM Releases) by Manville Corporation on behalf of itself and its Affiliates and by each of the JM Plaintiffs are hereby ratified and confirmed, and such parties are hereby authorized to execute and deliver such additional documents and do such things as may be necessary to perform, implement and effectuate the Settlement Agreement and this Order;

(B) in accordance with Bankruptcy Rule 7067 and with the terms and conditions set forth in the Settlement Agreement, each Settling Insurer Party shall, on the Payment Date; (i) deposit with the Clerk of this Court (or pursuant to his written instructions as this Court, by subsequent order, may direct) its Settlement Amount in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and (ii) within twenty

(20) days thereafter provide to this Court and Manville Corporation an explanation of the computation of said Settlement Amount, and the Clerk is authorized and directed to receive and deposit said Settlement Amounts in an interest-bearing account to be approved by this Court;

(C) the disposition of the Settlement Fund shall remain subject to the jurisdiction and further orders of, and proceedings in, this Court;

(D) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(E) upon payment by each Settling Insurer Party of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, each such Settling Insurer Party and its Settling Insurer Group (including, in the case of the Settling Insurer Group which includes Lloyd's Syndicates and British Companies, all Lloyd's Syndicates and British Companies which are or are alleged to be subscribing insurers to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement) shall have no further duties or obligations based upon, arising out

of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such payment be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(F) upon deposit of the Settlement Amounts as set forth in Paragraph (B) above, all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer Parties are not so enjoined), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against any and all of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan,

is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(G) the dismissal, unconditionally and with prejudice, on the Payment Date of both: (i) the claims between the JM Plaintiffs, on the one hand, and the Settling Insurer Parties, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself, is hereby approved and authorized.

Dated: December 18, 1986
New York, New York

ENTER,

BURTON R. LIFLAND
United States Bankruptcy Judge

EXHIBIT A

Settlement Agreements	Settling Insurers
1. Settlement Agreement dated as of November 22, 1985	The Aetna Casualty & Surety Company
2. Settlement Agreement dated as of March 26, 1986	The Aetna Casualty & Surety Company
3. Settlement Agreement dated as of October 7, 1986	AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA
4. Settlement Agreement dated as of May 12, 1986	American Re-Insurance Company
5. Settlement Agreement dated as of September 26, 1986	Centaur Insurance Company
6. Settlement Agreement dated as of October 20, 1986	Commercial Union Insurance Company and The Northern Assurance Company of America
7. Settlement Agreement dated as of October 21, 1986	First State Insurance Company

Settlement Agreements	Settling Insurers
8. Settlement Agreement dated as of March 27, 1986	Gibraltar Casualty Company
9. Settlement Agreement dated as of September 18, 1985	Highlands Insurance Company
10. Settlement Agreement dated as of January 29, 1985	Insurance Company of North America, Midland Insurance Company and Allstate Insurance Company, as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company")
11. Settlement Agreement dated as of February 20, 1986	INSCO Ltd.
12. Settlement Agreement dated as of October 20, 1986	International Surplus Lines Insurance Company
13. Settlement Agreement dated as of September 8, 1986	[Settling insurers are set forth under the definition of "Settling Insurers" in paragraph 13.1 of this order]

Settlement Agreements	Settling Insurers
14. Settlement Agreement dated as of October 10, 1986	Marsh & McLennan, Incorporated and Marsh & McLennan, Limited
15. Settlement Agreement dated as of May 22, 1985	Peerless Casualty Company (now known as Peerless Insurance Company)
16. Settlement Agreement dated as of March 27, 1986	Prudential Reinsurance Company
17. Settlement Agreement dated as of May 28, 1986	Puritan Insurance Company
18. Settlement Agreement dated as of April 24, 1986	Reliance Insurance Company (on behalf of itself and as successor in interest to Standard Accident Insurance Company)
19. Settlement Agreement dated as of October 21, 1985	Rocky Mountain International Insurance Ltd.
20. Settlement Agreement dated as of October 10, 1986	Rocky Mountain International Insurance Ltd.
21. Settlement Agreement dated as of October 22, 1986	Royal Belge

Settlement Agreements	Settling Insurers
22. Settlement Agreement dated as of April 23, 1986	Sun Insurance Office, Limited, The London Assurance, and Sun Alliance Insurance Company
23. Settlement Agreement dated as of July 18, 1984	[Settling Insurers are set forth under the definition of "Settling Insurer Party" in paragraph 23.1 of this Order]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82-B-11656
Through 82-B-11676

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Leslie E. Orr, being duly sworn, says that she is over the age of 18 years and is employed by Davis Polk & Wardell, co-counsel to the debtors herein, and that on or before December 17, 1986 she caused to be served one true copy of the "ORDER WITH RESPECT TO INSURANCE SETTLEMENT AGREEMENTS" to the entities named on the attached list by hand delivery.

/s/ LESLIE E. ORR
Leslie E. Orr

Sworn to before me
on December 17, 1986

/s/ NANCY P. MARGOLIS
Notary Public

Nancy P. Margolis
Notary Public State of New York
No. 31-4876483
Qualified in New York County
[ILLEGIBLE]

Method of Service

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Attorneys for the Mac Arthur
Company and Western Mac
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James J. Higgins, Esq.

[LETTERHEAD OF ILLEGIBLE]

December 17, 1986

The Honorable Burton R. Lifland
United States Bankruptcy Court
for the Southern District
of New York
40 Foley Square
New York, New York 10007

Dear Judge Lifland:

Enclosed is a copy of the proposed order approving the insurance settlement agreements that were the subject of the final hearing on November 17. As I stated at the close of that hearing, this order is large, but uncomplicated. Each of the settlement agreements contained a section permitting the insurer to terminate the agreement if an order was not entered containing the provisions set forth in that paragraph. The provisions of each separate agreement were either identical or substantially similar, but they utilized definitions (set forth in each agreement) which were slightly different. Out of an excess of caution, therefore, the proposed order submitted herewith contains both the precise provisions that must be included in the approval order to prevent termination, together with the precise definitions that appear in each settlement agreement.

Respectfully submitted,

/s/ LOWELL GORDON HARRISS
Lowell Gordon Harriss

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
Clerk of Court

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of May two thousand and eight,

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In re: Johns-Manville Corporation, Debitor

Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation and Manville Service Corporation), Manville International Canda, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl RanchCorporation, Johns-Manville Idaho Inc., Manville Canada Service Inc. and Sunbelt Contractors Inc.,

Debtors,

Travelers Casualty and Surety Company,
Travelers Property Casualty Corp.,
Travelers Indemnity Company,

Movants-Appellees-Cross-Appellants,

Common Law Settlement Counsel, Statutory Settlement Counsel, Hawaii Settlement Counsel,

Movants-Appellees,

v.

OneBeacon America Insurance Company,

Objector-Appellant,

Continental Casualty Company, Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants, Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony,

Objectors-Appellants-Cross-Appellees.

ORDER :
No. 06-2099-bk (L), 06-2103-bk (con), 06-2105-bk (con), 06-2118-bk (con), 06-2186-bk (con)

Travelers Indemnity Company, Travelers Casualty and Surety Company, and Travelers Property Casualty Corp., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request

for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
Clerk of Court

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of May two thousand and eight,

---

In re: Johns-Manville Corporation, Debitor

Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation and Manville Service Corporation), Manville International Canda, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl RanchCorporation, Johns-Manville Idaho Inc., Manville Canada Service Inc. and Sunbelt Contractors Inc.,

Debtors,

Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Travelers Indemnity Company,

Movants-Appellees-Cross-Appellants,

Common Law Settlement Counsel, Statutory Settlement Counsel, Hawaii Settlement Counsel,

Movants-Appellees,

v.

OneBeacon America Insurance Company,

Objector-Appellant,

Continental Casualty Company, Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants, Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony,

Objectors-Appellants-Cross-Appellees.

ORDER :

No. 06-2099-bk (L), 06-2103-bk (con), 06-2105-bk (con), 06-2118-bk (con), 06-2186-bk (con)

Common Law Settlement Counsel having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active mem-

bers of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-2099-bk(L),
06-2103-bk(con), 06-2105-bk(con),
06-2118-bk(con), 06-2186-bk(con)

Filed February 15, 2008

JUDGMENT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of February, two thousand eight,

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Before:

Hon. Guido Calabresi, Hon. Sonia Sotomayor,
Hon. Richard C. Wesley,
Circuit Judges.

IN RE: JOHNS-MANVILLE CORPORATION,

Debtor.

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation and Manville Service Corporation), MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO INC., MANVILLE CANADA SERVICE INC. AND SUNBELT CONTRACTORS INC.,

Debtors,

TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS PROPERTY CASUALTY CORP., TRAVELERS INDEMNITY COMPANY,

Movants-Appellees-Cross-Appellants,

COMMON LAW SETTLEMENT COUNSEL, STATUTORY SETTLEMENT COUNSEL, HAWAII SETTLEMENT COUNSEL,

Movants-Appellees,

—v.—

ONEBEACON AMERICA INSURANCE COMPANY,

Objector-Appellant,

CONTINENTAL CASUALTY COMPANY, CHUBB INDEMNITY INSURANCE COMPANY, ASBESTOS PERSONAL INJURY PLAINTIFFS, CASCINO ASBESTOS CLAIMANTS, PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY,

Objectors-Appellants-Cross-Appellees.

Appeals from an order of the United States District Court for the Southern District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and were argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the Order of said district court is VACATED and the case is REMANDED for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims in accordance with the opinion of this court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk

by /s/ Joy Fallek

JOY FALLEK
Administrative Attorney

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement

not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly

collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

> **(i)** the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—
>
> > **(I)** is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to

deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such

injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of per-

sons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology dif-

ferent from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be—

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements—

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as—

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such bal-

ance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different

simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following—

(i) by making the statement: "Your first payment in the amount of $____ is due on ____ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest.

If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court

unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your

obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of

this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $____, leaving $____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be over-

come if I explain to the satisfaction of the court how I can afford to make the payments here: ____.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (pro-

vide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(l) Notwithstanding any other provision of this title the following shall apply:

> **(1)** A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.
>
> **(2)** A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.
>
> **(3)** The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on

the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

OPPOSITION BRIEF

Supreme Court, U.S.
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Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

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QUESTION PRESENTED

Whether, in interpreting injunctions contained in the Insurance Settlement and Confirmation Orders entered by the Bankruptcy Court in 1986 (the "1986 Orders"), the Court of Appeals:

1. Properly analyzed the jurisdictional limitations of the Bankruptcy Court in entering those orders;

2. Correctly concluded that the Bankruptcy Court lacked jurisdiction in 1986 over claims against non-debtor insurers that were not derivative of insurance policies that constituted property of the Debtors' estates;

3. Correctly interpreted the 1986 Orders in a manner consistent with the scope of the Bankruptcy Court's jurisdiction in 1986; and, therefore,

4. Correctly vacated the Bankruptcy Court's 2004 "Clarifying Order" and remanded the matter for further consideration of whether any of the "Direct Action" complaints violate the 1986 Orders.

RULE 29.6 DISCLOSURE

Chubb Indemnity Insurance Company is a wholly-owned subsidiary of Federal Insurance Company, which in turn is a wholly owned subsidiary of The Chubb Corporation, which is publicly held. No publicly held company otherwise directly or indirectly owns 10% or more of Chubb Indemnity Insurance Company.

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INTRODUCTION

Nothing about this case recommends it as a meritorious candidate for the issuance of a writ of certiorari to this Court. There is no inter-circuit conflict. The Second Circuit's decision was interlocutory, and broke no new doctrinal ground. To the contrary, its ruling is entirely consistent with the rulings of a number of other courts, most especially the Third Circuit's decision in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), recognizing and enforcing limitations upon the jurisdiction and/or power of bankruptcy courts to grant non-debtor injunctions/releases (which as a general rule are not permitted under 11 U.S.C. § 524(e)). Indeed, the issues that Petitioners seek to raise are unlikely to arise in another situation remotely similar to this one.

While Travelers purports (at 24) to invoke this Court's supervisory powers over the Second Circuit, it was the Second Circuit that itself was forced to police the jurisdictional boundaries of the Bankruptcy Court. The Bankruptcy Court, purportedly engaged in injunction enforcement proceedings, instead undertook to approve what were in essence a series of three mandatory class action settlements of the kind even an Article III court has no authority to approve.[1] These settlements not only required the Bankruptcy Court to

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[1] This Court's back-to-back decisions in *Amchem Prods. v. Windsor*, 521 U.S. 591, 627 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), struck down similar attempts to engineer mandatory class-action settlement schemes in asbestos mass-tort litigation under Fed. R. Civ. P. 23.

reward alleged contemnors for their own violations of court orders, but purported to "clarify" the rights of unrepresented absent parties who had asserted no Direct Action Claims, expanded the scope of the 1986 Injunctions to protect additional entities, and violated the requirements of § 524(g) by establishing separate settlement funds to provide preferential treatment to select beneficiaries of the Manville Trust.

The petitions should be denied.

STATEMENT OF THE CASE

A. The 1986 Injunctions

This landmark case, filed in 1982, pioneered a novel approach to mass asbestos-disease claims in the context of Chapter 11 reorganization proceedings. Present and future asbestos bodily injury claims were channeled to a trust fund for consideration and payment, while the reorganized debtors were discharged of further liability to the asbestos claimants. The trust had two major sources of funding – an 80% stake in the stock of reorganized Manville,[2] and the proceeds of settlements between Manville and its liability insurers. In 1994, Congress ratified this approach with the enactment of 11 U.S.C. §§ 524(g-h).

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[2] Except where noted, the capitalized terms used in this brief shall have the meaning ascribed to them in the Bankruptcy Court's Findings of Fact and Conclusions of Law and Clarifying Order. Appendix citations are to the Appendix to Travelers' Petition. References to "A-__" are to the Appendix filed in the Second Circuit.

Travelers Indemnity Company ("Travelers Indemnity") was Manville's primary liability insurer from 1947-1976. Aetna Casualty and Surety n/k/a Travelers Casualty and Surety ("Travelers C&S")[3] separately issued excess liability policies to Manville. (A-116). Respondent Chubb Indemnity Insurance Company ("Chubb") had no insurance relationship with Manville and had no involvement in this case prior to June 2004.

In 1984, Travelers Indemnity settled its insurance coverage litigation with Manville. (A-116). Other insurers, including Travelers (then Aetna) C&S also settled with Manville. On December 18, 1986, the Bankruptcy Court entered the Insurance Settlement Order, approving all then-pending insurance settlements. (295-456a).

The Insurance Settlement Order contains the Insurance Injunction that, with limited exceptions, bars the assertion against Settling Insurers of "Policy Claims," defined as

> any and all claims . . . (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer

[3] Before 1996, Travelers C&S had no relationship with the Travelers group of companies and, unlike Travelers Indemnity, was not a primary insurer of Manville. Nevertheless, the Bankruptcy Court incorrectly lumped these two entities (and others) together in its findings and conclusions.

> Group based upon, arising out of or relating to the Policies [of the respective settling insurer].

(430a). "Policy Claims" were not nullified, but were instead channeled to the "Settlement Fund" consisting of the combined settlements paid by the settling Manville insurers. (441a).

On December 22, 1986, the Manville Plan was confirmed. The Confirmation Order contained the Channeling Injunction. The Channeling Injunction prohibits "All Persons" from taking action "for the purpose of, directly or indirectly, collecting . . . with respect to any Claim, Interest or Other Asbestos Obligation . . . against or affecting the Debtors . . . or any of the Settling Insurance Companies." (286-287a). "Claim," "Interest" and "Other Asbestos Obligation" are terms defined by the Manville Plan and refer to claims arising from or derivative of Manville's own liabilities. (A-422, A-426, A-428). The Manville Trust assumed liability for "all AH [Asbestos Health] Claims, Other Asbestos Obligations and Indemnification Liabilities." (A-403). The Confirmation Order "channeled" all such claims to the Manville Trust. (286-288a). The Confirmation Order further transferred the insurance Settlement Fund to the Manville Trust. (280a).

Contrary to the Travelers-authored findings adopted by the Bankruptcy Court in 2004, back in the 1980s Travelers[4] itself agreed that the Insurance Settlement

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[4] Chubb uses the term Travelers to refer to those entities (and their then-existing affiliates) that settled with Manville in the 1980s and were actually granted the benefit of the (Cont'd)

Order was not intended to enjoin actions that did not seek the proceeds from Manville's insurance policies. In a 1985 memorandum urging the Bankruptcy Court to approve Manville's settlement with Travelers Indemnity, Manville's counsel wrote: "*Manville does not seek to have this Court release its Settling Insurers from any claims by third parties based on the Insurer's own tortious misconduct towards the third party*, as opposed to its misconduct towards Manville." (A-962, 1025 (emphasis added)). The Committee of Asbestos Related Litigants, nonetheless, expressed the concern that the proposed order could bar claims involving "the Settling Insurers' own tortious and bad-faith misconduct in refusing to defend, settle and pay claims." (A-544, 578-79). This dispute was resolved by the proponents of the settlement, *including Travelers Indemnity*, agreeing that "[t]he channeling order is intended only to channel claims against the *res* to the Settlement Fund and *the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers.*"[5] (A-1116, 1118 (emphasis added)).

(Cont'd)

Bankruptcy Court's 1986 Injunctions. The Clarifying Order, however, defined "Travelers" to include entities that had no relationship with any Travelers entity in 1986, thereby retroactively and impermissibly extending the benefit of the 1986 Injunctions to these new entities. To avoid blurring this distinction, where Chubb refers to "Travelers" as defined in the Bankruptcy Court's order, that term appears in quotation marks.

[5] The foregoing, of course, torpedoes Travelers' erroneous assertion (at 21) that "[i]f the original panel opinion . . . affirming the Manville confirmation order on direct appeal in 1988 . . . had reached the same conclusion as the panel opinion below, Petitioners would never have contributed to the Manville trust."

B. Travelers Claims that the Direct Action Lawsuits Violate the 1986 Injunctions

In recent years, several dozen insurers, including various Travelers entities, have been sued in so-called "Direct Action Lawsuits." These are not traditional "direct action" suits in which a claimant attempts to recover proceeds of insurance policies to satisfy claims arising from the wrongful conduct of insureds. Instead, the Direct Action Lawsuits seek to impose potentially unlimited, extra-contractual liability upon the insurers for such insurers' own alleged misconduct.

The Direct Action Lawsuits come in two basic forms, "Statutory" and "Common Law." Statutory Direct Actions are purportedly brought pursuant to consumer protection statutes and assert that insurers acted improperly in defending their insureds *other than Manville* against asbestos personal injury claims. These insurers, it is alleged, raised "fraudulent" defenses to such claims and, as a result, the claimants either settled their claims too cheaply or were dissuaded from filing suit at all.

"Common Law" Direct Action Lawsuits are based upon many of the same factual allegations, but purport to assert claims under common law theories such as conspiracy, negligent undertaking, and misrepresentation. Complaints in these cases typically allege that the "insurance industry" as a whole had some sort of freestanding duty to warn the general public about the dangers of asbestos and an unlimited liability to asbestos claimants for breaching that alleged duty. (A-1525-39). No state court has recognized these outlier

legal theories. (143a). Chubb is or was a defendant along with Travelers in a number of Common Law Direct Actions in Ohio and in Texas, but is not a party to any Statutory Direct Actions.

In 2002, Travelers moved to enjoin the Statutory and Common Law Direct Actions, claiming that such lawsuits violated Travelers' protections as settling Manville insurers under injunctive language contained in the 1986 Orders. The Bankruptcy Court entered several restraining orders in 2002 and 2003, temporarily enjoining prosecution of both the Common Law and the Statutory Direct Actions against Travelers.

C. "Injunction Enforcement" Morphs into Court-Sanctioned Settlements

Instead of ruling on the motions, the Bankruptcy Court sent the parties to mediation. The mediation resulted in a series of settlements. On March 5, 2004, Travelers entered into a settlement agreement with the Statutory Direct Action plaintiffs and their counsel pursuant to which Travelers agreed to pay $360 million plus $37.5 million of attorneys' fees. (A-662-79). In May 2004, Travelers entered into a settlement agreement with the Common Law Direct Action plaintiffs and their counsel pursuant to which Travelers agreed to pay $70 million plus $20 million of attorneys' fees. (A-799-815). Travelers also entered into a third settlement agreement with a group of plaintiffs in Hawaii who were seeking to impose liability on Travelers for its allegedly fraudulent defense during the 1990s of Combustion Engineering, a company totally unrelated to Manville. (A-840-56).

Thus, Travelers was willing to pay the Direct Action claimants and their counsel upwards of half a billion dollars to settle lawsuits that it claimed were already barred by the 1986 Injunctions. But there was a catch. Travelers would pay the money, but only if Travelers could tie the settlement to a mechanism for cutting off any further Direct Action claims against it and any potential indemnity or contribution claims from its insurer co-defendants in the Direct Action Suits. Thus, each of the Direct Action Settlement Agreements was conditioned upon the entry of an order by the Bankruptcy Court "interpret[ing]" and "clarify[ing]" that the Direct Actions always had been prohibited by the 1986 Injunctions. (A-817).

Although the Bankruptcy Court repeatedly claimed that it was "interpreting" and "enforcing" its prior injunctions, what Travelers filed were three motions *to approve settlement agreements*, not to enforce injunctions. (A-637-61, A-781-98, A-826-39). The Bankruptcy Court scheduled hearings on the motions *to approve settlement agreements*, not on the prior motions to enforce injunctions. (A-877-86). Notices of settlement were published and were mailed to individuals who previously had submitted asbestos bodily injury claims against the Manville Trust (but not to any of Travelers' co-defendants in the Direct Action Suits, such as Chubb). The notices that were approved by the Bankruptcy Court were only intended to apprise people who "filed or resolved an asbestos-related personal injury or wrongful-death claim or may do so in the future," that their "rights to file claims against

Travelers Property Casualty Company and affiliated Travelers entities may be affected *if a settlement is approved* by the Court."[6] (A-887-94, emphasis added).

To preserve its potential indemnity/contribution rights, Chubb filed a limited objection to the motion to approve the Common Law Direct Action settlement urging that the Bankruptcy Court had no jurisdiction or discretion to undertake to affect any of Chubb's rights, and that to the extent the 1986 injunctions purported to do so already, they were unenforceable as against Chubb.

On July 6, 2004, the Bankruptcy Court held an evidentiary hearing on the motions to approve the various settlement agreements. (A-1591-1645). On August 17, 2004, the Bankruptcy Court approved the settlements. The Bankruptcy Court's order confirmed that the purpose of the July 6 hearing was to hear "evidence of the fairness of th[e] settlement[s] . . ." (90a). Nevertheless, to satisfy the condition of the settlement

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[6] Everything that happened before the Bankruptcy Court following the announcement of the settlement agreements was consistent with the granting of new and expanded relief to "Travelers," but entirely inconsistent with the notion of injunction "enforcement." There would have been no need to undertake a "broad, nationwide notice campaign" (A-1818) in order to enforce the 1986 Injunctions because the alleged contemnors already were before the Bankruptcy Court. Notice is only needed for approval of a settlement, and then only if the settlement order would affect rights of absent parties. If the rights of absent parties to bring Direct Actions had been extinguished pursuant to the 1986 Injunctions, there could be no reason to give them notice of anything in 2004.

agreements, the Bankruptcy Court held that the various Direct Action Lawsuits, including the Common Law Direct Actions, were barred by the Channeling Injunction. (92a). Because Travelers conditioned the settlement upon the Bankruptcy Court finding that the 1986 Injunctions had been violated – to be accompanied by judicial approval of the settlement – the Direct Action plaintiffs and their counsel happily conceded their own violations and, as more fully described at pp. 21-22, below, withdrew their opposition to Travelers' position that the Direct Action Suits were enjoined by the 1986 Injunctions.

The Bankruptcy Court concluded that "the evidence on the record and before this court establishes that the direct action claims against Travelers are inextricably intertwined with Travelers[']] long relationship as Manville's insurer." (169a). The Bankruptcy Court "clarifie[d] that the Direct Action Claims that are the subject of these proceedings are within the scope of the Confirmation Order's and the Insurance Settlement Order's prohibitions, and are — and always have been — permanently barred." (170a). The Bankruptcy Court further held that all contribution or indemnity claims against "Travelers" in connection with the Direct Action Lawsuits were barred by the Confirmation Order. (94a).

The District Court affirmed the Bankruptcy Court's Clarifying Order. However, it vacated the Clarifying Order's "gate-keeper" provision, which required potential future claimants against Travelers to obtain Bankruptcy Court approval before filing their complaints in another court, as beyond the subject matter jurisdiction of the Bankruptcy Court.

On February 15, 2008, a three-judge panel of the Second Circuit, consisting of Judges Calabrese, Sotomayor, and Wesley, vacated the Clarifying Order. In a unanimous opinion authored by Judge Wesley, the court concluded that the Bankruptcy Court had erred when it interpreted the 1986 Injunctions as barring claims "predicated upon an independent duty [allegedly] owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." (App. 6a). The court remanded the cause to the Bankruptcy Court to determine whether that court had jurisdiction to enjoin any of the Direct Action Lawsuits.

Motions for rehearing by the panel or *en banc* were denied, and efforts to stay issuance of the mandate were rejected by the Second Circuit and by Justice Ginsberg acting for this Court.

REASONS FOR DENYING THE PETITIONS

A. In Harmony with Precedents of Other Circuits, and Its Precedents in This Case, the Second Circuit Correctly Interpreted the Scope of the 1986 Injunctions by Reference to the Bankruptcy Court's Contemporaneous Jurisdictional Restrictions

While much of its opinion is couched in terms of jurisdictional limitations, the Second Circuit was actually reviewing the Bankruptcy Court's *interpretation* of its 1986 Injunctions. The Second Circuit accepted the Bankruptcy Court's assertion that it had intended to provide settling insurers with "global finality" in 1986. But the Second Circuit correctly observed that "global finality is only as 'global' as the bankruptcy court's jurisdiction." (30a). As a result, it held that the Bankruptcy Court erred in 2004 by "interpreting the terms 'based upon, arising out of or related to the Policies' without reference to the court's jurisdictional limits [in 1986]." (31a). As the court pointed out, "[t]he fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims." (28a).

Hence, while the Second Circuit acknowledged that it was "literally" possible to read the 1986 Injunctions as broadly as the Bankruptcy Court did, the Second Circuit ruled that it was legal error for the Bankruptcy Court to adopt such a literal interpretation instead of "read[ing] the 1986 orders to conform with the bankruptcy court's jurisdiction of the *res* of the

Manville estate." (33a). Beyond the fact that Travelers contemporaneously acknowledged such limitations on the 1986 Injunctions, such a reading comports with the Second Circuit's recognition, in its 1988 opinion affirming the Confirmation Order, that the 1986 Orders were issued pursuant to the Bankruptcy Court's "equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created." *MacArthur Co. v. Johns-Manville Corp.* (194a).

> The injunctive orders issued by the Bankruptcy Court were necessary to effectuate the Court's channeling authority, that is, to make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund and could not be asserted directly against the insurers. The authority to issue the injunction is thus a corollary to the power to dispose of assets free and clear and to channel claims to the proceeds.

(199a). As the Second Circuit recognized, whether or not the Direct Action Suits have any merit, at least the complaints presented in the appellate record did not seek to collect from the policy proceeds, the *res* that was property of the Manville estate over which the Bankruptcy Court possessed jurisdiction in 1986 and which supported the exercise of *in personam* jurisdiction over those asserting interests in that *res*.

In arguing to the contrary, Travelers misconstrues the nature and scope of bankruptcy jurisdiction. "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction . . . [and] is premised on the debtor and his estate. . . ." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 369-70 (2006). By its very nature, it is a "narrow jurisdiction." *Id.* at 378. The core purposes of bankruptcy are (1) to provide the honest but unfortunate debtor with the "fresh start" of a bankruptcy discharge, while (2) marshaling and maximizing the value of the debtor's assets for equitable distribution among his creditors. It is true, as Travelers points out, that "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*." *Id.* at 370. But the point this Court made in *Katz* was that bankruptcy courts may issue ancillary *in personam* orders to enforce their *in rem* adjudications, not that they may seek to discharge liabilities of non-debtors that are not derivative of the conduct of the debtor or the property of its estate.

Travelers itself acknowledged before the lower courts that the "original jurisdiction" of the bankruptcy court in 1986 to provide *in personam* injunctive protection to non-debtor insurers such as Travelers derived from its *in rem* jurisdiction over Manville's insurance policies as property of the Manville estate. (A-1833). And it was maximizing the policy proceeds for the Manville estate that provided justification for the bankruptcy court's extension of "channeling injunction" protection to the settling insurers from Policy Claims and claims that are derivative of Manville's liabilities. (164a).

The Second Circuit did not alter the scope of the 1986 Injunctions or otherwise impugn their finality, as Petitioners argue. To the contrary, it was the Bankruptcy Court that impermissibly purported to expand their scope by conflating the notion of a "Policy Claim," with Travelers' alleged "insurance relationship" with Manville. While Policy Claims were defined as claims arising from the insurance policies that were property of the estate, the "insurance relationship" construct sweeps much more broadly to include, for example, Travelers' conduct in the defense of claims in Hawaii on behalf of a wholly different insured, Combustion Engineering, separated by decades from Travelers' defense of Manville. By contrast, the Second Circuit adhered to the general doctrine of constitutional avoidance by declining to adopt an interpretation of the terms "based upon, arising out of or related to the Policies" that, while "literally" conceivable, would have resulted in the constitutionally-suspect conclusion that the Bankruptcy Court intended to exceed the boundaries of its subject matter jurisdiction in 1986.[7]

The Second Circuit further correctly distinguished other situations where the 1986 Injunctions were enforced to bar claims against Manville's insurers:

> Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated*

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[7] Further, the Second Circuit's holding is consistent with the Fifth Circuit's ruling in *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), that shared facts do not support the assertion of related-to bankruptcy jurisdiction absent some potential impact upon an asset that is property of the estate.

> to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies. . . . Moreover, the claims at issue here do not seek to collect on the basis of Manville's conduct. . . . Plaintiffs neither seek to recover insurance proceeds nor rely on the insurance policies for recovery. (23a).

Likewise, the Second Circuit reasoned, § 524(g) must be interpreted to conform with the jurisdiction of bankruptcy courts. (33a). The injunctive relief authorized by § 524(g)(4)(A)(ii)(III) for third parties is authorized only "to the extent such alleged liability . . . arises by reason of . . . such third parties' provision of insurance to the debtor." Consistent with the Third Circuit's holding in *In re Combustion Eng'g, Inc.*, the Second Circuit concluded that this provision permits relief only as to third-party actions in which the non-debtors' alleged liability "was derivative of the debtors." (35a). Without conceding that the Direct Action Suits have any factual or legal merit, their theories posit violations of legal duties independent of any alleged wrongful conduct by Manville or the proceeds of any policies issued to Manville. Thus, the Second Circuit properly concluded, "[b]ecause the claims here are non-derivative and have no effect on the *res*, they are outside the limits of § 524(g)." (35a). Again, the Second Circuit honored the doctrine of constitutional avoidance by declining to infer a broad Congressional intent to authorize bankruptcy courts to grant releases/

injunctive relief to non-debtors that cannot be directly tied to property of a bankruptcy debtor's estate and are not derivative of a debtor's own tort liabilities.

B. The Interlocutory Nature of the Second Circuit's Ruling Further Militates in Favor of Denying the Petitions

Interlocutory orders are particularly poor candidates for certiorari. It has long been the standard practice of this Court to refrain from issuing a writ of certiorari to review non-final orders or decrees absent some extraordinary circumstances. *See American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

Here, the Second Circuit remanded the case "for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims" in light of the guidance supplied by its opinion. No extraordinary circumstances are present here that might warrant this Court's short-circuiting the ordinary course of the underlying proceedings. To the contrary, the doctrine of constitutional avoidance again counsels restraint.

Notwithstanding these principles, Travelers argues (at 16-19) that the Second Circuit's ruling conflicts with the Supremacy Clause. But Travelers is free on remand to demonstrate, if it can, that particular Direct Action complaints in fact seek to put Travelers "in Manville's chair," as Travelers alleges (at 10), by seeking to collect proceeds of Travelers' Manville insurance policies and/or otherwise to impose liability on Travelers that is

derivative of Manville's own tortious conduct. Travelers' argument is premature, however, because it assumes that some state's law not only would recognize the outlier legal theories asserted in the Direct Action Lawsuits, but also would permit these plaintiffs to collect Manville-derived liabilities from Travelers. Neither of these things has come to pass and there is no reason to anticipate the future creation of a state law cause of action that conflicts with the confirmed Manville Plan.

C. The Esoteric Issues Petitioners Seek to Raise Are Unlikely to Provide Meaningful Guidance in Future Cases

In addition to the lack of a circuit split and the interlocutory nature of the Second Circuit's decision, the questions for which Petitioners seek certiorari arise in a most unusual factual and procedural posture – the interpretation of a 20-year old order in the context of "injunction enforcement" proceedings that had themselves devolved into a "settlement approval" hearing. Indeed, Travelers' petition takes a page and a half to build up to a three-part "Question Presented" that obviously is of scant interest to anyone other than the parties themselves. These unique issues and circumstances do not lend themselves to a decision likely to provide broader guidance to lower courts. The questions presented by Petitioners therefore are undeserving of the attention and scarce resources of this Court.

D. Numerous Alternative Grounds, Not Reached by the Second Circuit, Likewise Would Have Required that the Clarifying Order Be Vacated

1. The Clarifying Order Suffered from Additional Jurisdictional Defects

Quite apart from the jurisdictional analysis performed by the Second Circuit in rejecting the Bankruptcy Court's 2004 interpretation of its 1986 Orders, the proceedings below and the resulting Clarifying Order suffered from additional jurisdictional deficiencies.

Lack of Ripeness: As the District Court held, the Bankruptcy Court lacked jurisdiction to predict and pass upon whether Direct Action suits that have not been filed would violate the 1986 Injunctions. Likewise, it lacked jurisdiction to predict whether as-yet-unasserted potential indemnity and/or contribution claims by Chubb against Travelers would be barred by the 1986 Injunctions. The sole source of bankruptcy jurisdiction was the Bankruptcy Court's authority to interpret and enforce its 1986 Orders. Therefore, that court would have been acting within the scope of its limited, remnant subject matter jurisdiction had it directed the plaintiffs in the challenged Direct Action Lawsuits to cease and desist from their violation of those injunctions. But the Bankruptcy Court exceeded that narrow jurisdiction by purporting to "clarify" the rights of individuals or entities that have not even sued Travelers and had not been made a party to the enforcement proceedings.

No Jurisdiction to Perform Settlement Approval: Further, the Bankruptcy Court had no jurisdiction to approve settlements, which the Petitioners conceded were neither factually nor analytically connected to the Bankruptcy Court's limited injunction enforcement jurisdiction. Travelers repeatedly emphasized that the motions to enforce the 1986 Injunctions were "*analytically and legally distinct* from the settlement agreements," (A-1818), and acknowledged that the approvals of the settlement agreements were *"wholly separate"* from the Bankruptcy Court's merits rulings. (A-1802-03, A-1821-22) (emphasis added). *See also* (A-1818-19) (motion to enforce the Confirmation Order was "separate and distinct issue" from whether to approve the settlement agreements), (A-1855) (approval of settlements was "[s]eparate and distinct from its conclusion that the pending direct action claims violated the Confirmation Order"). Moreover, approving settlements that *reward* injunction violators for those very violations cannot be said to be part of the Bankruptcy Court's arsenal of contempt-based enforcement powers. *See United States v. Pauley*, 321 F.3d 578, 580 (6th Cir. 2003) (rewarding a party for violating court's injunction not "an available tool" for encouraging party's compliance).

Mootness: Conversely, since the Direct Action claimants and their lawyers had pre-agreed with Travelers as part of their settlements to jointly cooperate in obtaining findings that the Direct Action lawsuits violated the 1986 Injunctions, there remained no legitimate "case or controversy" to support the Bankruptcy Court's continued exercise of its narrow injunction-enforcement remnant jurisdiction.

Accordingly, constitutional mootness likewise deprived the Bankruptcy Court of subject matter jurisdiction, preventing it from entering the Clarifying Order.

By July 2004, the current Direct Action plaintiffs had agreed to settle amicably and dismiss their actions against Travelers. This mooted their dispute. "A live controversy, within the Article III jurisdiction of the federal courts, requires a plaintiff seeking relief and a defendant opposing that relief." *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 638 F.2d 7, 8 (2d Cir. 1980) (case mooted where settlement between union and company provided that union would continue to seek ruling that complaints stated valid claims, but agreed not to proceed further in an effort to obtain relief in event of favorable ruling). The absence of a truly adversarial proceeding meant that the requisite legal controversy needed to "sharpen the issues for judicial resolution" had ceased to exist. *Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992). The Clarifying Order therefore constituted a prohibited advisory opinion.

Any doubt about the non-adversarial nature of the proceedings before the Bankruptcy Court was explicitly dispelled by the Common Law petitioners: "mediation resulted in three settlements, affording approximately $440 million of compensation . . . in exchange for dismissal of all pending lawsuits, 84,000 releases *and the Direct Action plaintiffs' withdrawal of their opposition to Travelers' position that the Direct Actions were enjoined.*" (A-1880, emphasis added). Thus, according to the Direct Action plaintiffs, their claims are barred by the 1986 Injunctions, not because they really

are, but rather because making such a concession was part of the bargained-for consideration exchanged pursuant to settlement agreements. Indeed, Common Law Plaintiffs Counsel highlighted the academic nature of the July 6, 2004 proceedings before the Bankruptcy Court:

> [T]he settlements meant that the parties were able to present evidence and the arguments of counsel to Judge Lifland and have him rule on whether the Direct Actions against Travelers . . . were indeed barred by the Confirmation Order, *without committing to accepting the consequences of a final order if Judge Lifland did not believe that the Confirmation Order barred the Direct Actions.*

(A-1883) (emphasis added).

Since the "controversy" was moot, the Bankruptcy Court's findings, conclusions and "Clarifying Order" amounted to an impermissible advisory opinion.

2. The Clarifying Order Impermissibly Sought to Reward, Rather than Punish, Alleged Violators of the 1986 Injunctions

If the Bankruptcy Court were correct in finding that the 1986 Injunctions clearly barred the Direct Action cases, then the Bankruptcy Court's approval of the Direct Action settlements through the Clarifying Order constituted a serious abuse of discretion. The Bankruptcy Court's jurisdiction was to enforce its orders

and *punish* violators, not to bless their misconduct by approving settlements designed to reward the violators and their counsel for these very violations.

A consensual resolution cannot have as its foundation a judicial ruling that finds a party in violation of that court's injunction and then rewards that party for its conduct: "[C]ourts should not use their authority . . . to reward parties' contempt of prior orders." *United States v. Pauley*, 321 F.3d at 581. Thus, "blatant refusal to comply with a court order would have warranted contempt proceedings, but certainly not a reward for their obstruction." *Id.* at 582.

No matter how Petitioners tried to disguise it, the Clarifying Order sought to bestow an enormous reward upon the Direct Action plaintiffs and their counsel premised upon their supposed violation of the 1986 Injunctions. If the Direct Action Lawsuits violated the prior injunctions, Travelers was entitled to the enforcement of those injunctions without paying "consideration" to the violators. Because courts simply cannot condone a party's profiting from violations of their orders, the Bankruptcy Court's entry of the Clarifying Order approving such a "settlement" constituted a manifest abuse of discretion that independently would have required that the Clarifying Order be vacated.

3. The Clarifying Order Impermissibly Expanded the Scope of the 1986 Injunctions to Extend Protection to Additional Entities

The "Clarifying Order" undeniably represents an expansion of the protection of the 1986 Injunctions — at least with respect to "Travelers" affiliates like Citigroup, Inc., which were not "affiliates" of any Travelers entities back in 1986. The Bankruptcy Court had no jurisdictional basis for doing so, which provided yet another independent ground for vacating the Clarifying Order.

4. The Clarifying Order Impermissibly Approved a Preferential Settlement Fund for Select Manville "Stakeholders" in Contravention of 11 U.S.C § 524(g) as Well as an Overriding Goal of the Manville Plan

Even if jurisdiction existed to extend the protection of the 1986 Injunctions to additional "Travelers" entities, any such protection would have had to satisfy the requirements of § 524(g). While the original injunctions may have been issued in reliance upon an expansive reading of 11 U.S.C. § 105(a), Travelers agrees that "Section 524(g) specifically applies to the Manville injunction by virtue of Section 524(h)," enacted in 1994. (A-1219).

It follows, therefore, that any expansion of the protection of the 1986 Injunctions, whether it be expanding the scope of Travelers' protections or defining new entities like Citigroup within the definition of "Travelers" for the first time, must comply with

§ 524(g)'s requirements. Congress has laid down express conditions to the provision of injunctive relief to non-debtors. Specifically, 11 U.S.C. § 524(g)(4)(B)(ii) requires non-debtor parties to justify extension of injunctive relief through the provision of additional benefits *to the trust*, not to preferred groups of claimants.

Yet, none of the settlements approved by the Bankruptcy Court provide for the settlement funds, or any other amounts, to be deposited into the Manville Trust to benefit all claimants, present and future. Instead, the settlements authorize payment of all of the settlement proceeds to select Direct Action plaintiffs and their counsel. Moreover, the bankruptcy court's failure to adhere to this requirement not only violates § 524(g), but does violence to a central tenet of the Manville Plan.

Common Law Settlement Counsel has described the Direct Action plaintiffs as the "last remaining stakeholders in the Manville Estate." (A-1905-06). They claim that although "other stakeholders had been satisfied years ago," these "last remaining stakeholders in the Manville Estate, have not been." *Id.* As Manville "stakeholders," these Direct Action Claimants were represented, either actually or virtually, in the Manville bankruptcy and therefore are bound by the Manville Plan, which, consistent with the classic limited fund model, marshaled assets and placed them in the Manville Trust for their *non-preferential* payment to current and future asbestos claimants on an identical basis. This requirement reflects a cornerstone goal of the Manville Plan and the Manville Trust – to provide identical treatment to all claimants, current and future,

"by virtue of the Injunction, which channels all claims to the Trust." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988).

Common Law Settlement Counsel bluntly acknowledged that the Direct Action Settlements attempt an end-run around the Manville Trust to obtain preferred access to additional purportedly Manville-derived funds because these Manville "stakeholders" otherwise "would very likely be unable to recover any money from the nearly depleted Manville Trust." (A-1908-09). Travelers confirmed that the settlement funds are "separate and apart from the Manville Trust." (A-1817). Because the settlements did not comply with § 524(g), the Bankruptcy Court was not permitted to extend the scope of "Travelers'" injunctive relief through the Clarifying Order.

5. Chubb Cannot Constitutionally be Bound to the Bankruptcy Court's 1986 Injunctions and 2004 Clarifying Order

As explained above, the Bankruptcy Court had no subject matter jurisdiction in the first place to render an advisory opinion as to whether any potential future indemnification or contribution claim by Chubb against Travelers would violate the 1986 Injunctions. In addition, another set of constitutional and jurisdictional concerns independently prevented the Bankruptcy Court both from exercising jurisdiction *ab initio* over Chubb, a non-Manville insurer, in 1986 and from purporting to "clarify" Chubb's rights under the 1986 Injunctions in 2004.

In 1986, Chubb at most was a potential future claimant, which could not be given the notice and opportunity to be heard — as due process required in order to bind Chubb to the results of those proceedings to which it was a stranger at that time. Travelers itself emphasized to the Bankruptcy Court that the Common Law Direct Action lawsuits that are being asserted against Chubb are based upon legal theories that are "unprecedented now" and were "unimaginable then." (A-1217). Unlike future asbestos claimants, for whom the Bankruptcy Court appointed a legal representative to protect their rights during the bankruptcy proceedings, no effort was made to protect Chubb or other non-Manville insurers through a virtual representative, and no provisions were made to provide appropriate consideration for the confiscation of Chubb's rights.

Chubb's predicament mirrors the situation in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 258 (2d Cir. 2001), *aff'd by evenly divided Court*, 539 U.S. 111 (2003), in which an injunction against future Agent Orange litigation was held *not* to bind future claimants who were not adequately represented in the prior proceedings:

> Defendants likewise strenuously argue that the district court's injunction against future litigation prevents these appellants from maintaining their actions. While it is true that "[a]n injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience," [citations omitted], defendants' injunction-based argument

> misses the point. The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs.

Stephenson, 273 F.3d at 257. *See also, e.g., Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994) (finding that when absent class members were not adequately represented in a post-settlement modification of a class-wide injunction, "*res judicata* did not bar them from collaterally attacking the [modification] proceedings").

One set of petitioners, Common Law Settlement Counsel, agreed with Chubb that the Bankruptcy Court lacked jurisdiction to bind Chubb to its 1986 Injunctions: "Common Law Settlement Counsel agrees that there is no circumstance under which Chubb could be bound by the Confirmation Order" because Chubb "never insured Manville." (A-1925, n.15). "Chubb is not bound by any of Judge Lifland's rulings respecting Travelers." (A-1928, n.16).

Although the District Court rejected Chubb's contention, the Second Circuit never reached Chubb's meritorious argument on this point, which constitutes an additional, independent reason why neither the 1986 Injunctions, nor the Clarifying Order, are binding upon Chubb.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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OPPOSITION BRIEF

111

(5) (4)

Nos. 08-295 & 08-307

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE ASBESTOS PERSONAL INJURY RESPONDENTS

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review a case pending in a court of appeals by writ of *certiorari* before or after rendition of a judgment or decree. 28 U.S.C. § 1254(1). However, as discussed below, this Court has denied *certiorari* in the past where, as here, the circuit court below did not enter judgment but instead remanded the matter for further proceedings. *E.g., Va. Military Inst. v. United States*, 508 U.S. 946, 946, 113 S. Ct. 2431, 124 L. Ed. 2d 651 (1993); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967). Denial of certiorari is likewise appropriate here.

STATEMENT OF THE CASE

A. In 1986, the Bankruptcy Court entered a Confirmation Injunction in Johns-Manville's bankruptcy case barring derivative suits against Johns-Manville's insurers.

In August of 1982, Johns-Manville, buckling under the weight of its asbestos liabilities, filed a petition for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Lifland, J. (the "*Bankruptcy Court*"). *In re Johns-Manville Corp.*, 517 F.3d 52, 56 (2d Cir. 2008).

On December 22, 1986, the Bankruptcy Court confirmed Johns-Manville's plan of reorganization via its Order Confirming Debtor's Second Amended and Restated Plan of Reorganization (the "*Confirmation Order*") (SPA-4). The Confirmation Order provided for a channeling injunction/asbestos trust structure that would later be used as a template by Congress when formulating

Section 524(g) of the Bankruptcy Code. *In re Johns-Manville*, 517 F.3d at 57. The channeling injunction in the Confirmation Order (the "*Confirmation Injunction*") barred derivative claims against Johns-Manville's insurers by proscribing:

> Any and all claims, demands, allegations, duties liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

(SPA-295-96).

Predictably, the Confirmation Injunction was challenged on appeal. In 1988, the Second Circuit upheld the Confirmation Order, concluding that the Confirmation Injunction applied only to third parties who sought to collect out of the proceeds of Manville's insurance policies on the basis of Manville's own conduct. The Second Circuit concluded, therefore, that the Confirmation Injunction was jurisdictionally sound.[1] *See id.* at 68.

In 1994, Congress enacted Bankruptcy Code, Section 524(g), which provides a statutory basis for

---

1. As the Second Circuit recognized:

> The application of a § 524 channeling injunction to enjoin actions against third parties is limited to situations where a third party has derivative liability for the claims against the debtor.

Johns Manville, 517 F.3d at 68. (internal quotations omitted).

injunctions that bar derivative claims against a debtor's insurer for asbestos claims arising out of the conduct of the debtor but for which the insurer is liable under its policies with the debtor. *Id.* at 67-68.

B. Sixteen years later, the Bankruptcy Court erroneously concluded for the first time that the Confirmation Injunction also barred non-derivative, third-party actions against non-debtors.

Following confirmation of Johns-Manville's Plan, a number of asbestos victims, including the Asbestos Personal Injury Plaintiffs (the "*Independent Action Plaintiffs*"), sought recovery directly from Travelers[2] for its discreet conduct perpetuating the asbestos epidemic and aggravating the damages and harms suffered by asbestos victims. *Id.* at 57. In these actions (the "*Independent Actions*"), the Independent Action Plaintiffs alleged that Travelers intentionally acted on its own to suppress information and knowledge about asbestos hazards and intentionally propagated a fraudulent "state of the art" defense to wrongfully frustrate or defeat lawful rights of asbestos victims. *Id.* at 58. The Independent Action Plaintiffs initiated litigation against Travelers, not as Johns-Manville's principal insurer, but as an independent tortfeasor. *Id.* at 63. The torts giving rise to the Independent Actions were entirely separate and independent from Manville's tort liability. The Independent Action Plaintiffs did not seek relief from Johns-Manville's

2. "*Travelers*" refers to Petitioners, The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp.

insurance proceeds, nor did they seek recovery from the asbestos trust created by Johns-Manville's confirmed bankruptcy plan to process and pay asbestos claims against Johns-Manville.[3] *Id.* These claimants sought recovery directly from Travelers' own funds. *Id.*

In response to the growing number of these Independent Actions, Travelers moved in the Bankruptcy Court, on June 19, 2002, to enjoin twenty-six Independent Actions pending in Louisiana, Massachusetts, Texas, and West Virginia state courts. *Id.* at 58. Despite the Second Circuit's 1988 opinion recognizing the limited scope of the Confirmation Injunction,[4] Travelers erroneously asserted that it was entitled to injunctive relief because the Independent Actions were barred by the Confirmation Order. *Id.* at 58-59. Many of the plaintiffs in the Independent Actions contested Travelers' overreaching attempts to enjoin their suits.

On August 1, 2002, the Bankruptcy Court referred Travelers' motion to mediation. *Id.* at 58. The mediation sessions resulted in three separate settlements. *Id.* These settlements were conditioned upon the entry of an order by the Bankruptcy Court "clarifying that the [Independent Actions] are, and have always been,

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3. Notably, the claimants could not have recovered from the Asbestos Trust for their claims against Travelers, because the trust distribution procedures governing the asbestos trust do not contemplate payment of claims against Travelers for damages caused by Traveler's independent tortious conduct.

4. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988).

prohibited by the [Confirmation Order]." *Id.* On June 5, 2007, Travelers filed its Motion to Approve the Common Law Direct Action Settlement Agreement (the "*Settlement Motion*"), wherein it expressly requested the Bankruptcy Court to enter an order "interpreting and enforcing the injunctions" of the Confirmation Order (A-798).[5]

In considering Travelers' Settlement Motion, the Bankruptcy Court interpreted the Confirmation Injunction to bar all insurer claims falling within the Bankruptcy Court's subject matter jurisdiction. *In re Johns-Manville*, 340 B.R. 49, 60 (S.D.N.Y. 2006). At the invitation of Travelers, and over vigorous objections by counsel for the Independent Action Plaintiffs, the Bankruptcy Court then determined that the Independent Actions fell within its subject matter jurisdiction at the time it entered the Confirmation Order in 1986 (SPA-315-16).

On August 17, 2004, the Bankruptcy Court entered its Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction (the "*Clarifying Order*") (SPA-334-50). In the Clarifying Order, the Bankruptcy Court erroneously concluded that the Independent Actions fell within its subject matter jurisdiction and were, therefore, enjoined by the Confirmation Order (SPA-335-36).

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5. Petitioners also submitted a proposed order with their Settlement Motion that provided that "[t]his is an order interpreting and enforcing the Confirmation Order" (A-818).

C. The District Court erroneously upheld the Bankruptcy Court's conclusion that the Bankruptcy Court had subject matter jurisdiction to bar non-derivative, third-party, non-debtor actions.

On September 24, 2004, the Asbestos Personal Injury Plaintiffs filed an amended notice of appeal, appealing the Bankruptcy Court's Clarifying Order to the United States District Court for the Southern District of New York, Koeltl, J. (the "*District Court*") (A-1729-36). In its March 28, 2006 Opinion and Order, the District Court vacated certain provisions of the Clarifying Order not at issue here, but upheld the Bankruptcy Court's conclusion that the Independent Actions fell within the Bankruptcy Court's subject matter jurisdiction (SPA-48).[6] The Asbestos Personal Injury Plaintiffs appealed to the Second Circuit Court of Appeals seeking review of, *inter alia*, that portion of the District Court's order upholding the Bankruptcy Court's ruling concerning its subject matter jurisdiction over the Independent Actions.

---

6. On March 31, 2006, the District Court entered a Judgment to the same effect as its March 28th Opinion and Order.

D. The Second Circuit correctly concluded that the Bankruptcy Court lacked subject matter jurisdiction to bar non-derivative, third-party actions against non-debtors because such actions do not affect the *res* of a debtor's bankruptcy estate.

On appeal, the Second Circuit correctly recognized that "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction . . . . Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed [Independent Actions]" *Johns-Manville*, 517 at 60-61. Following generations of precedent, the Second Circuit concluded that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66. Because the Second Circuit found that the Independent Action Plaintiffs had no right to recover from Johns-Manville under the laws of the states where the Independent Actions arose, it held that the Independent Actions did not fall within the subject matter jurisdiction of the Bankruptcy Court. *Id.* at 68. The Second Circuit remanded the matter for the Bankruptcy Court to examine whether, in light of the Second Circuit's opinion, the Bankruptcy Court had jurisdiction to enjoin the Independent Actions. *Id.*

PETITIONERS' PETITIONS FOR WRIT OF *CERTIORARI* SHOULD BE DENIED BECAUSE THIS MATTER IS NOT RIPE FOR CONSIDERATION BY THE COURT.

As an initial matter, the Petitioners' ill-conceived petitions for writ of *certiorari* are premature and granting *certiorari* to review the Second Circuit's interlocutory order would be improper under these circumstances.

The Court generally awaits final judgment in the lower courts before exercising its *certiorari* jurisdiction. *Va. Military Inst. v. United States*, 508 U.S. 946, 946, 113 S. Ct. 2431, 124 L. Ed. 2d 651 (1993) ("We generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction"). In the instant matter, the Second Circuit remanded the case back to the Bankruptcy Court for further proceedings as follows:

> The order of the district court is VACATED and the case REMANDED for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims.

Johns-Manville, 517 F.3d at 68. Consequently, this case is not yet ripe for review by this Court. *See Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967) (finding that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

This Court has denied *certiorari* in the past solely on the basis that the matter was not yet ripe for review. *Va. Military Inst.*, 508 U.S. at 946 (denying *certiorari* where "[t]he Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy"); *Bhd. of Locomotive Firemen & Enginemen*, 389 U.S. at 328 (denying certiorari where "[t]he Court of appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt"). It should deny *certiorari* here as well.

PETITIONERS' PETITIONS FOR WRIT OF *CERTIORARI* SHOULD BE DENIED BECAUSE *CERTIORARI* IS NOT JUSTIFIED UNDER SUPREME COURT RULE 10.

As a general matter, the Court requires a party petitioning for *certiorari* review to demonstrate a compelling reason for review, characterized by the following:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals . . .
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [or]

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

A. Common Law Settlement Counsel fails to provide an analysis under Supreme Court Rule 10.

Common Law Settlement Counsel's petition for writ of *certiorari* fails to state a ground upon which *certiorari* may be granted. Instead, Common Law Settlement Counsel uses its petition for writ of *certiorari* as a vehicle to make its argument on appeal—*i.e.*, that the issue before the Second Circuit was an issue of "statutory authority" and not an issue of subject matter jurisdiction. This argument is contradicted by an entire body of case law; courts consider a bankruptcy court's ability to enjoin third-party, non-debtor conduct to be a jurisdictional issue. Common Law Settlement Counsel's petition does not provide grist for a Rule 10 analysis. Pursuant to Supreme Court Rule 15.2,[7] however, the Asbestos Personal Injury Plaintiffs address Common Law Settlement Counsel's meritless argument below.

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7. Under Supreme Court Rule 15, a brief in opposition "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The rule goes on to provide that "[c]ounsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15.2.

B. Travelers fails to provide a compelling reason for *certiorari* review under Supreme Court Rule 10.

In its petition for writ of *certiorari*, Travelers attempts to convince this Court that the Second Circuit's opinion is somehow extraordinary and has turned the bankruptcy world on its head. Nothing could be further from the truth. In the proceedings below, the Second Circuit ruled on the discreet issue of whether a bankruptcy court has subject matter jurisdiction to enjoin a non-derivative, third-party, non-debtor action against a debtor's insurer to recover directly from the coffers of the insurer for damages arising out of the insurer's own misconduct. The Second Circuit held that a bankruptcy court has no such jurisdiction, because non-derivative, third-party, non-debtor actions have no effect on the *res* of the bankruptcy estate subject to the bankruptcy court's *in rem* jurisdiction.[8]

Far from being extraordinary or aberrational in any sense, the Second Circuit's holding preserves the traditional line that has historically marked the boundary between those matters that lie within a bankruptcy court's subject matter jurisdiction and those matters that lie outside it. In rendering its decision, the Second Circuit merely adhered to what this Court too has repeatedly recognized: "Bankruptcy jurisdiction, at its core, is *in rem*."[9] For a matter to fall within a

8. Bankruptcy courts are courts of ***limited jurisdiction***. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed.2d 598 (1982).

9. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L. Ed.2d 945 (2006).

bankruptcy court's subject matter jurisdiction, it must have some effect on the debtor or the *res* of the debtor's bankruptcy estate. This principle pervades not only 28 U.S.C. §§ 157 and 1334—the statutory predicates for bankruptcy jurisdiction—but the Bankruptcy Code itself, including Sections 524(g) and 105(a).

Travelers' apocalyptic ruminations that bankruptcy courts' inability to bar non-derivative, third-party, non-debtor claims against insurers based on insurers' own misconduct will "undo" Section 524(g) is unfounded. In the sixteen years preceding the Clarifying Order, neither the Bankruptcy Court nor any other court had attempted to enforce the Confirmation Order to enjoin claims such as the Independent Actions. Furthermore, in the fourteen years since the enactment of Section 524(g), no Court has held that the supplemental channeling injunction provided for in that provision may be used to enjoin claims such as the Independent Actions. In fact, no authority exists from any jurisdiction that would suggest that a bankruptcy court may bar non-derivative actions against a debtor's insurer that seek to recover directly from the insurer for the insurer's own tortious conduct. The Petitioners' "sky is falling" argument is nothing more than an ill-conceived attempt to mislead this Court into reviewing a matter that does not meet any of the criteria enunciated in Rule 10.

The Second Circuit's decision simply reined in an errant bankruptcy court that failed to recognize that "global finality is only as 'global' as the bankruptcy court's jurisdiction." *Johns-Manville*, 517 F.3d at 66. In doing so, the circuit court restored the natural order

that had been disturbed by a perverse "interpretation" of the Confirmation Order, which itself threatened the bankruptcy world. Because the Second Circuit's ruling merely re-established the *status quo ante*, this is not a matter appropriate for *certiorari* review by this Court.

PETITIONERS' REQUESTS FOR *CERTIORARI* RELY ON MISREPRESENTATIONS OF LAW AND FACT

A. Travelers' assertion that the Second Circuit's decision runs afoul of Section 524(g) is belied by the very language of the statute itself.

Travelers seeks *certiorari* based on the dubious notion that the Second Circuit's decision calls the statutory scheme of Section 524(g) into question, complaining that "[t]he Second Circuit improperly limited the reach of Section 524(g) to only those claims that are 'derivative' of a debtor's liability, or that seek the '*res*' of the debtor's estate" (Travelers Br. at p. 15).

Travelers conveniently overlooks that the third-party supplemental injunction provided for in Section 524(g) is, by the terms of Section 524(g) itself, limited to claims that are derivative of a debtor's liability.

Section 524(g)(4)(A)(ii) limits the scope of third-party, non-debtor claims to which a supplemental channeling injunction may apply to those claims that are based on the conduct of the debtor—*i.e.*, derivative claims—as follows:

> (ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action

> directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable ***for the conduct of, claims against, or demands on the debtor*** to the extent such alleged liability of such third party arises by reason of—
>
> . . .
>
> (III) the third party's provision of insurance to the debtor or a related party

11 U.S.C. § 524(g)(4)(A)(ii)(III) (emphasis added). As Travelers recognizes, when Congress wants to restrict the application of a particular provision of the Bankruptcy Code, it does so in the plain text of the provision (Travelers' Br. at p 15-16). And so it has here. Thus, Travelers' assertion that the Second Circuit's ruling improperly cabins the scope of Section 524(g) without Congress' providing for such a limitation in the statute is dispatched by the statutory language itself.

Travelers further laments that the Second Circuit's decision deprives insurance companies of the "only means available for definitively resolving asbestos-related liability" (Travelers' Br. at p. 16). This argument is inherently flawed, because it erroneously assumes that the Independent Action Plaintiffs' claims against Travelers are "asbestos-related." They are not. Travelers' liability arises out of fraud, bad faith and related malfeasance that is unrelated to asbestos, except for the purely incidental happenstance of

Travelers' insured's being an asbestos producer. Had Johns-Manville produced something besides asbestos, Traveler's liability would be unaffected. The Independent Actions are simply not the types of actions contemplated by Congress when enacting Section 524(g).

The Second Circuit's ruling does not disturb bankruptcy courts' traditional authority to fashion reorganizations under Section 524(g). Instead, it reestablishes the *status quo ante* that existed prior to the Bankruptcy Court's unprecedented and anomalous "interpretation" and "clarification" of the Confirmation Order.

B. Travelers' insistence that the Second Circuit's decision conflicts with other case law is not supportable.

Until the Clarifying Order, no bankruptcy court anywhere had ever enforced an injunction in a confirmation order in a manner that would bar a creditor from seeking to recover directly from the coffers of a debtor's insurer for the ***insurer's*** own misconduct. No court had even alluded that such an injunction would be proper. As discussed below, the authorities cited by Travelers to support its erroneous argument, to the extent that they are relevant at all, strongly imply that such an injunction would be wholly improper and would exceed a bankruptcy court's subject matter jurisdiction.

1. This Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) in no way provides that a bankruptcy court's jurisdiction extends to matters having no effect on the *res* of the debtor's estate.

Travelers implies that the Second Circuit's decision conflicts with the Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). Travelers manipulates the holding in *Katz* to support the erroneous proposition that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor claims that do not have any affect on the *res* of the debtor's bankruptcy estate or on the debtor itself. Such an argument, however, is belied by the Court's own language in *Katz*, which actually supports the Second Circuit's holding.

In *Katz*, the Court was asked to determine whether a State's sovereign immunity would be compromised if a bankruptcy court ordered that a preferential transfer to a State be avoided and the *res* returned to the debtor's estate. In holding that avoidance of a preferential transfer to a State does not violate the State's sovereign immunity, the Court embarked upon its analysis by recognizing that bankruptcy jurisdiction is essentially *in rem*. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006). The Court, therefore, determined that it was obliged to address the issue of whether a bankruptcy court's subject matter jurisdiction is limited merely to an adjudication of the rights in the debtor's *res*, or whether it is broad enough to also allow a bankruptcy court to enter orders enforcing those rights. *Id.* at 370

(recognizing that "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications").

In concluding that a bankruptcy court does have the jurisdiction to enforce its rulings regarding a debtor's rights to the *res* of its estate, the Court reasoned as follows:

> The interplay between *in rem* adjudications and orders ancillary thereto is evident in the case before us. Respondent first seeks a determination under 11 U.S.C. § 547 that the various transfers made by the debtor to petitioners qualify as voidable preferences. The § 547 determination, standing alone, operates as a mere declaration of avoidance. That declaration may be all that the trustee wants; for example, if the State has a claim against the bankruptcy estate, the avoidance determination operates to bar that claim until the preference is turned over. In some cases, though, the trustee, in order to marshal the entirety of the debtor's estate will need to recover the subject of the transfer pursuant to § 550(a). A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.

Id. at 371-72.

The analysis used by the Court in *Katz* reaffirms the principle that any ancillary jurisdiction a bankruptcy court may have is firmly rooted in and only arises out of its jurisdiction over the *res* of the bankruptcy estate. This is the same principle relied upon by the Second Circuit below when it opined that, while derivative actions against insurers may fall within bankruptcy jurisdiction because such actions seek to recover from the estate *res*—*viz*, insurance policy proceeds—actions such as the Independent Actions that do not affect estate *res* are outside bankruptcy courts' limited jurisdiction. The Court's analysis in *Katz* directly supports the Second Circuit's conclusion that the nexus to the *res* of a debtor's estate confers subject matter jurisdiction to enjoin derivative actions under Section 524(g) and Section 105(b); where, as here, no such nexus exists, the bankruptcy court lacks subject matter jurisdiction. The *res* of Johns-Manville's bankruptcy estate certainly does not stretch far enough to include Travelers' coffers.

2. Travelers fails to provide the Court with even a solitary example in which a lower federal court exercising bankruptcy jurisdiction has enjoined third-party, non-debtor actions that do not affect the *res* of the debtor's bankruptcy estate.

Travelers makes a half-hearted attempt to manufacture a split among the circuits by asserting that "bankruptcy courts have long issued orders that necessarily reach beyond the debtors' *res*" (Travelers Br. at 14). This assertion is a provocative misrepresentation of bankruptcy jurisprudence. The circuit courts uniformly decline to exercise power to grant releases to third-party non-debtors where such releases would not serve to prevent the depletion of the assets of the bankruptcy estate or otherwise affect the *res* of the estate.

The Third, Fourth, Fifth, Sixth and Seventh Circuits have all expressly held that a solid nexus to the *res* of the debtor's estate is required. *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (holding that a bankruptcy court has authority to enjoin claims against a non-debtor only where seven factors are present, including such an identity of interests between the debtor and the third party that a suit against the third party would deplete the assets of the debtor's estate); *In re Cont'l Airlines*, 203 F.3d 203, 217 (3d Cir. 2000) (finding an insufficient basis for authorizing non-debtor releases where there was no fact-intensive analysis at the bankruptcy or district court level to determine whether or not insurance proceeds that would be implicated by the releases were property of the estate); *In re Zale Corp.*, 62 F.3d 746, 756 (5th Cir. 1995) (refusing to uphold releases of third-party non-debtor insurance companies where the claims against the non-debtors did not implicate property of the estate, and thus the bankruptcy court lacked jurisdiction to enjoin them); *Matter of Specialty Equip. Cos.*, 3 F.3d 1043, 1049 (7th Cir. 1993) (refusing to overturn non-debtor releases only where there was already substantial consummation of the plan of reorganization and where appellants failed to demonstrate that the releases would adversely affect the debtor or the property of the estate); *In re A.H. Robbins Co.*, 880 F.2d 694, 702 (4th Cir. 1989) (enjoining claims against third-party, non-debtors who would have indemnification or contribution rights against debtor for any judgments).

The Ninth and Tenth Circuits have gone further and categorically forbidden releases of third-party non-debtors, reasoning that such releases are impermissible

in light of section 524(e), whether the *res* of the bankruptcy estate was implicated or not. *See Resorts Int'l, Inc. v. Lowenschuss (In re Loweschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995); *In re W. Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990).

Those circuit courts that have not directly addressed the issue of whether a bankruptcy court may permit releases of non-debtor third-parties in the Chapter 11 context have at least acknowledged that such releases are not permissible, absent certain limited and extenuating circumstances. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996) (permanently enjoining non-settling defendants in a related adversary proceeding from bringing contribution and indemnification claims against non-debtor consulting firm where the permanent injunction was found to be integral to the debtor's own settlement with the consulting firm); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 985 (1st Cir. 1995) (acknowledging that a bankruptcy court may grant releases to third-party non-debtors where "an injunction allows a settlement that forms the basis of the chapter 11 plan to take effect . . . and hence the plan hinges on the parties being free from the very claims the injunction would prohibit"); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986) (refusing to disturb the district court's finding that the plan of reorganization had been substantially implemented after a complex series of transactions, where the issue of whether or not the plan provided for releases that violated section 524(e) was effectively moot).

The cases relied upon by Travelers all comport with the Second Circuit's opinion, because the bankruptcy court orders in those cases all related to matters that directly affected the bankruptcy estate.

a. Travelers' reliance on *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) is misplaced.

For example, Travelers' reliance on *In re Dow Corning Corp.* is misplaced, because the Sixth Circuit held that enjoining a non-consenting creditor's claim against a non-debtor is *only* appropriate where *all* of the following six factors are present:

> (1) ***There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate***; (2) The nondebtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;

> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

In re Dow Corning Corp., 280 F.3d at 658 (emphasis added). Clearly, the *Dow Corning* court's decision cannot plausibly be construed to support Travelers' insistence that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor actions where there is no effect on the *res* of the debtor's estate. The Sixth Circuit specifically says that such an injunction would be appropriate only where the action enjoined could deplete the assets of the debtor's estate.

b. Travelers' reliance on *Petition of Portland Electric Power Co. (Delzell v. Flagg)*, 97 F.Supp. 877 (D. Or. 1943) is misplaced.

Travelers' reliance on *Portland Electric Power Co.*, is similarly misplaced. In *Portland Electric*, Portland Electric Power Company, the debtor, sought an injunction barring the Public Utilities Commissioner of Oregon from reducing the existing rate schedules of Portland General Electric Company, a wholly-owned subsidiary of the debtor. The commissioner argued that the bankruptcy court lacked subject matter jurisdiction to enjoin him from reducing the rates charged by Portland General Electric Company, a non-debtor. The court couched the issue as follows:

> The argument then proceeds that this property is not within the jurisdiction of the court, because the Portland General Electric

> Company is a separate entity, is solvent and has never been brought within the scope of the bankruptcy proceedings.

Pet. of Portland Elec. Power Co. (Delzell v. Flagg), 97 F.Supp. 877, 880 (D. Or. 1943).

The Court first recognized that "if property is subject to the jurisdiction of the court, any person who threatens interference therewith is liable to restraint." *Id.* The court then went on to find that Portland General Electric Company was a wholly-owned subsidiary of the debtor and that its stock was the principle asset to be dealt with in the debtor's reorganization proceedings. Thus, "[a]ny circumstance which affects the value of this stock will affect the reorganization proceeding and if the value thereof be decreased, the reorganization proceeding may fail entirely of its purpose." *Id.* The court concluded that it had subject matter jurisdiction to bar the commissioner from lowering the rates charged by the subsidiary of the debtor because such a lowering of rates would affect the value of the debtor's bankruptcy estate. *Id.*

Clearly, *Portland Electric* does not support the proposition that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor actions that do not involve the debtor or the *res* of the debtor's bankruptcy estate. The district court concluded that it had jurisdiction to enjoin the commissioner only because the commissioner's actions threatened to affect the estate *res* by reducing its value. Whereas, here, the Independent Actions threaten only Travelers' own funds.

c. Travelers' reliance on *United States v. Energy Resources*, 495 U.S. 545 (1990) is misplaced.

In *United States v. Energy Resources*, the bankruptcy court confirmed a reorganization plan that created a special trust which, *inter alia*, was to pay the debtor's federal tax debt of approximately $1 million over roughly five years. Later, the trustee of the special trust sent approximately $385,000 in payment to the IRS. The trustee asked the IRS to apply the money to the debtor's trust fund tax debt. The IRS refused to do so, asserting that it could apply the money instead to non-trust fund tax debt that was not guaranteed. This Court held that "a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549, 110 S. Ct. 2139, 109 L. Ed. 2d 580 (1990).

Energy Resources thus implicated a bankruptcy court's broad authority to modify creditor-debtor relationships. *Id.* The issue of jurisdiction was not raised, because the bankruptcy court's order directly affected the resolution of a creditor's claim in the debtor's bankruptcy case. *Energy Resources* merely stands for the proposition that a bankruptcy court may determine how a debtor is allowed to satisfy a creditor's claim in its bankruptcy. The case does not discuss a bankruptcy court's subject matter jurisdiction to enjoin third-party, non-debtor actions and it assuredly does not hold that a bankruptcy court has subject matter jurisdiction to enjoin such actions when they do not affect the debtor or involve the *res* of the debtor's bankruptcy estate.

d. Travelers' reliance on both *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989) and *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bankr. S.D.N.Y. 1991) is misplaced.

Travelers' reliance on *A.H. Robins Co.* and *Drexel* is similarly contrived. In neither case did the court purport to enjoin third-party claims against non-debtors having no effect on the debtor's estate. Instead, the respective courts merely confirmed plans that enjoined claimants from asserting claims against non-debtors that "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution." *See e.g., In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989). In *A.H. Robins*, the debtor's plan enjoined certain claimants who opted out of a plan settlement from pursuing their causes of action against the debtor's directors and law firms who represented the debtor. The Fourth Circuit held that "where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits." *Id.* at 702. Similarly, in *Drexel* the bankruptcy court merely confirmed a plan that barred claims against officers and directors of the debtor to which the debtor could owe indemnification obligations. *See In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bankr. S.D.N.Y. 1991). Neither *A.H. Robins Co.* nor *Drexel* stands for the proposition that a bankruptcy court has jurisdiction unrelated to the *res* of the bankruptcy estate.

C. Travelers' extravagant assertion that the Second Circuit's decision runs afoul of the Supremacy Clause relies on a misrepresentation of the Second Circuit's holding and analysis.

Travelers misleadingly asserts that the Second Circuit "erroneously held that state law, not a federal confirmation order, determined whether these claims could proceed against Petitioners outside of the express provisions of the confirmation order" (Travelers Br. at 17). Traveler's assertion brazenly distorts the Second Circuit's analysis and holding.

In 2004, Travelers presented the Bankruptcy Court with the broad language used in the Confirmation Injunction and asked the Court to determine if the Independent Actions were barred by the provision. The Bankruptcy Court interpreted the Confirmation Injunction to bar any and all claims against Johns-Manville insurers falling within the Bankruptcy Court's subject matter jurisdiction. In holding that the Independent Actions were barred under the Confirmation Order, the Bankruptcy Court necessarily concluded that the claims fell within its limited jurisdiction.[10] In the Second Circuit's review, the threshold issue was whether the Bankruptcy Court's conclusion with regard to its subject matter jurisdiction was in error.

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10. Indeed, as discussed more fully below, the Bankruptcy Court and the parties considered subject matter jurisdiction to be a major issue in the bankruptcy proceedings (SPA-315-16).

The Second Circuit correctly recognized that, under established precedent, the Independent Actions did not fall within the Bankruptcy Court's subject matter jurisdiction if they did not affect the *res* of Johns-Manville's bankruptcy estate. The Second Circuit, therefore, conducted an analysis to determine whether the Independent Actions could have any such effect. The Second Circuit reasoned that if, under the state laws applicable to the claims, the claimants would not be entitled to recover from Johns-Manville or its bankruptcy estate, then, absent another nexus to the *res* of the bankruptcy estate, the claims did not fall within the Bankruptcy Court's subject matter jurisdiction.

It was entirely appropriate for the Second Circuit to look to state law to determine the Independent Action Plaintiffs' rights against Johns-Manville. It is a settled principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000). Indeed, the Court has long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 127 S. Ct. 1199, 1205, 167 L. Ed. 2d 178 (2007). Accordingly, when the Bankruptcy Code uses the word "claim", it is usually referring to a right to payment recognized under state law. *Id.* As this Court stated in *Butner v. United States*: "Property interests are created and defined by state

law" and "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

Thus, the Second Circuit correctly looked to state law for the limited purpose of determining whether the claimants would be entitled to recover from Johns-Manville's bankruptcy estate or if they were limited to recovering solely from the insurer tortfeasors. In doing so, the Second Circuit found that, despite the Bankruptcy Court's repeated statements that the claims "arise out of" Johns-Manville's insurance policies, claimants would not be entitled to recover from Johns-Manville or under Johns-Manville's insurance policies under applicable state law. *Johns-Manville*, 517 F.3d at 64. ("Thus, it is evident that Plaintiffs' Direct Action claims constitute independent tort actions").[11]

Because the Second Circuit found that the Independent Actions cannot affect Johns-Manville's bankruptcy estate, it concluded that they never fell within the Bankruptcy Court's subject matter

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11. The Second Circuit ultimately held that:

> Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers.

Johns-Manville, 517 F.3d at 65.

jurisdiction. The Second Circuit's decision presents no Supremacy Clause issue because there is no conflict between a legitimate confirmation order—properly premised on valid subject-matter jurisdiction—and the independent tort liability of Travelers to be litigated in the Independent Actions.

D. Judicial finality and repose are not compromised by a circuit court's reviewing on direct appeal a bankruptcy court's determination of its subject matter jurisdiction.

Travelers makes the spectacularly erroneous argument that "[t]he court of appeal's decision to revisit the propriety and scope of the confirmation order nearly a quarter century after the fact 'dishonor[s] the historic wisdom in the value of repose'" (Travelers' Br. at p. 20). This argument ignores the procedural history of this matter and Travelers' part in raising the issue of subject matter jurisdiction.

Travelers raised the issue of the Bankruptcy Court's subject matter jurisdiction in 2004, when it requested in its Settlement Motion that the Confirmation Order be "interpreted" to enjoin the Independent Actions. The Bankruptcy Court interpreted the Confirmation Injunction to bar all claims against insurers falling within the Bankruptcy Court's subject matter jurisdiction. Thus, the Bankruptcy Court was obliged to determine whether the Independent Actions fell within its subject matter jurisdiction. All the parties, and the Bankruptcy Court itself, recognized that subject matter jurisdiction was a threshold issue that Travelers' request demanded the Bankruptcy Court to determine (SPA-313-17).

Travelers' implication that the Clarifying Order merely decided the pedestrian issue of whether the Independent Actions "arise out of" or "relate to" Johns-Manville's insurance policies in the vernacular sense misses the point entirely. The issue decided by the Bankruptcy Court was whether the claims "arose out of" or "related to" the insurance policies as these phrases are understood in the bankruptcy realm and as Congress understood them when enacting 28 U.S.C. §§ 157 and 1334—*i.e.*, whether the claims fell within the Bankruptcy Court's subject matter jurisdiction. The Second Circuit reviewed the Bankruptcy Court's conclusions on direct appeal.

Furthermore, Travelers' assertion that "[t]he inequity of altering bankruptcy court protections—ex post and without compensation—is the very reason why settled authority prohibits collateral attacks on Chapter 11 reorganizations"[12] rings hollow, where, as here, Travelers was the party that sought an alteration of the Confirmation Order. It was Travelers—not the Independent Action Plaintiffs—that asked the Bankruptcy Court to "interpret" the Confirmation Order in a way that broadened the scope of the order far beyond the limits of the Bankruptcy Court's subject matter jurisdiction. Travelers invited the Bankruptcy Court to extend its subject matter jurisdiction beyond the realm ever conceived by Congress when enacting 28 U.S.C. §§ 157 and 1334. In entering its Clarifying Order, the Bankruptcy Court erroneously acquiesced. The Second Circuit reviewed the Clarifying Order on direct appeal. In doing so, the Second Circuit correctly

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12. (Travelers' Br. at p. 21).

concluded that "[t]he fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims." *In re Johns-Manville*, 517 F.3d at 65. For Travelers to seek and obtain an unwarranted and illegitimate extension of the Bankruptcy Court's subject matter jurisdiction some two decades after the entry of the Confirmation Order and then shriek "finality" when challenged is risible. Travelers placed jurisdiction in issue and should not be heard to complain when the Second Circuit ruled against it.

E. Common Law Settlement Counsel's assertion that the issues at bar are not jurisdictional is directly contradicted by case law.

Common Law Settlement Counsel takes a different tack than Travelers. Cognizant that the Bankruptcy Court lacked jurisdiction to bar the Independent Actions, Common Law Settlement Counsel inadvisably attempts to undermine the Second Circuit's decision *via* a hyper-technical argument, which is remarkable only for its absurdity. In short, Common Law Settlement Counsel asserts that:

> [o]nce a bankruptcy court's jurisdiction to confirm a plan of reorganization is determined, the focus shifts to whether the Bankruptcy Code authorizes such bankruptcy court to approve particular provisions within the proposed plan

(Common Law Settlement Counsel Br. at p. 10). The assertion that, if a bankruptcy court has jurisdiction to

enter a confirmation order, the court then has *carte blanche* to put any provision it wishes in the order without exceeding its subject matter jurisdiction is simply preposterous. A bankruptcy court's authority to enjoin non-debtor third party actions is an issue of subject matter jurisdiction, plain and simple. *See, e.g. In re Cont'l Airlines*, 203 F.3d 203, 214 n.12 (3d Cir. 2000) (noting that a bankruptcy court cannot simply presume it has jurisdiction to permanently enjoin third-party actions against non-debtors); *In re Zale Corp.*, 62 F.3d 746, 755 (5th Cir. 1995) (holding that a bankruptcy court may only consider enjoining third party actions after jurisdiction has been established) *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d Cir. 1988). As the Fifth Circuit in *Zale* opined:

> We must establish independently that a dispute is part of a bankruptcy case; the existence of power within the bankruptcy case does not imply an expansion of jurisdiction beyond it. To the contrary, it suggests that courts must be particularly careful in ascertaining the source of their power, lest bankruptcy courts displace state court for large categories of disputes in which someone . . . may be bankrupt. Accordingly a bankruptcy court may potentially include an injunction as part of a settlement only once jurisdiction is established.

In re Zale Corp., 62 F.3d at 755 (internal quotations and citations omitted). Common Law Settlement Counsel provides absolutely no authority stating otherwise.

The Clarifying Order purports to provide Travelers an unprecedented and improper discharge of any and all liability Travelers may have that is even remotely and incidentally related to asbestos—even those outside of any claims related to Johns-Manville. There is no conceivable scenario under which a bankruptcy court would have subject matter jurisdiction to issue an injunction so wide in scope for the benefit of a *non-debtor*. Common Law Settlement Counsel indulges in pure sophistry. To the extent that Common Law Settlement Counsel's erroneous legal principle is accepted at face value, a bankruptcy court could deal with any property or take any action with regard to the property of third parties, without the availability of jurisdictional challenge. Such broad jurisdiction was never contemplated by Congress for bankruptcy courts. A bankruptcy court presiding over Johns-Manville's bankruptcy can only assert jurisdiction over the *res* of the debtor's estate and not independent tort claims against Travelers.

CONCLUSION

For the reasons set out above, there is no basis for granting *certiorari* in this case and the Petitioners' respective petitions for writ *certiorari* should be denied.

Respectfully submitted,

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OPPOSITION BRIEF

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Nos. 08-307 and 08-295

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In The Supreme Court of the United States

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, et al.,

Respondents.

THE TRAVELERS INDEMNITY COMPANY, et al.,

Petitioners,

v.

PEARLIE BAILEY, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTRODUCTION

The Petitioners present no "compelling reasons" to justify the exercise of this Court's jurisdiction. See Supreme Court Rule ("Sup. Ct. R.") 10. The Second Circuit correctly interpreted and applied the existing legal precedent, statutory and judicial, as it applies to jurisdictional limitations for bankruptcy courts. As Congress has determined, bankruptcy courts are courts of limited jurisdiction that is conferred by statute. See 28 U.S.C. § 1334 (West 2008); 28 U.S.C. § 157 (West 2008). This Court has consistently recognized these limitations. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). The Second Circuit did not redefine the limits of statutorily conferred bankruptcy court jurisdiction, nor did it disregard this Court's well settled precedent. See *In re Johns-Manville Corp.*, 517 F.3d 52 (2nd Cir. 2008), petitions for cert. filed, 77 U.S.L.W. 3121 (Sep. 04, 2008) (No. 08-295), and 77 U.S.L.W. 3122 (Sep. 04, 2008) (No. 08-307). Rather, by refusing to abrogate the well established limits to the jurisdiction of bankruptcy courts, the Second Circuit prevented Petitioners' attempt to expand the jurisdiction of bankruptcy courts for their own convenience.

Petitioners, Common Law Settlement Counsel ("CLSC" or "Petitioners"), argue that a bankruptcy court may confirm a plan of reorganization whether or not jurisdiction exists over third parties potentially affected by the plan's provisions. See CLSC's *Petition for Writ of Certiorari*, Pg. 7. Jurisdiction may not be conferred over unrelated third parties, even by

agreement. *In re Combustion Engineering, Inc.*, 391 F.3d 190, 228 (3rd Cir. 2004). CLSC's argument is based on the assumption that a bankruptcy court may issue any remedy it chooses as part of a chapter 11 plan of reorganization without regard for the reach of the chosen remedy or its relationship to the Debtor and its estate. They reason that because the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") possessed jurisdiction to confirm the chapter 11 plan of reorganization proposed by Johns-Manville, that it must also surely have jurisdiction to enjoin disputes brought against non-debtor third parties under state law for their independent wrongdoing which seek no recovery from any part of the debtor's estate or *res*. Petitioners' assumption is in clear contravention of well established legal precedent, and completely disregards the reasoning and background of this Court's decision in *Central Virginia Community College v. Katz. Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). Adoption of CLSC's flawed logic would expand the jurisdiction of bankruptcy courts far beyond its current limits and convert it into the broadest of any court. A "Bankruptcy Court's jurisdiction cannot be limitless." *Celotex*, 514 U.S. at 308. However strident the machinations of Petitioners, the Second Circuit avoided such a troubling result by recognizing the limits of bankruptcy jurisdiction previously established by statute and by this Court.

Petitioners, Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers

Property Casualty Corp. (collectively "Travelers" or "Petitioners"), make a three-pronged plea to the Court. See Travelers' *Petition for Writ of Certiorari*, Pgs. 5-6. First, Travelers proposes that this Court extended the jurisdiction of the bankruptcy courts in its *Katz* decision. This proposition is founded on the use of selected quotes taken out of context and by ignoring the parts of that decision that are clearly contrary to Travelers' arguments. The issue before the Court in *Katz* was the extent of bankruptcy jurisdiction in the context of a preference action and its interplay with sovereign immunity, not the enjoining of disputes brought by non-debtor third parties against non-debtor third parties over non-debtor assets and liabilities. *Katz,* 546 U.S. at 359. In its second plea, Travelers' argues that because a federal statute exists, § 524(g) of the United States Bankruptcy Code, and that because § 524 authorizes a channeling injunction in appropriate actions, then state laws defining the actions to be channeled should be disregarded by the Bankruptcy Court. See Travelers' *Petition for Writ of Certiorari*, Pgs. 5-6. At no time prior to Travelers' Petition has any party to this matter asserted that state law in some way preempts federal bankruptcy laws. This argument raised by Travelers disregards the Second Circuit's basis for its ruling: that a lack of jurisdiction precludes the application of the federal channeling statute. *In re Johns-Manville Corp.*, 517 F.3d 52, 68 (2nd Cir. 2008), petitions for cert. filed, 77 U.S.L.W. 3121 (Sep. 04, 2008) (No. 08-295), and 77 U.S.L.W. 3122 (Sep. 04, 2008) (No. 08-307). Nowhere in its opinion does the

Second Circuit find that state law may preclude the application of § 524(g). *Id.* Travelers' final argument to this Court is also without merit. Travelers asserts that due to the age of the Johns-Manville bankruptcy proceeding, and specifically to the age of the order entered by the Bankruptcy Court confirming Johns-Manville's chapter 11 plan of reorganization (the "Confirmation Order"),[1] the Second Circuit's ruling somehow attacks and undermines the finality of the Confirmation Order. See Travelers' *Petition for Writ of Certiorari*, Pgs. 5-6. At no point has the *finality* of the Confirmation Order been questioned, either by Respondents or by the Second Circuit. Travelers' attempt to mis-characterize this dispute as one concerning the finality of the Confirmation Order obfuscates the true nature of this controversy. The issue involved in this case is the *extent of the scope* of the Confirmation Order, and the requirement, sought to be avoided by Travelers, that in determining the scope of the Confirmation Order the Bankruptcy Court not exceed its jurisdictional limits. Petitioners also fail to take into account that it was they who sought to extend the scope of the Confirmation Order by improperly seeking to broaden its plain language beyond the jurisdictional limits of the Bankruptcy Court. It is disingenuous for Petitioners to now claim that the Second Circuit's ruling somehow undermines the finality of the Confirmation Order. Petitioners were obviously not concerned with the finality of the

[1] Travelers' App. 261a.

Confirmation Order when they sought to expand its scope twenty years after its entry to protect themselves from their own potential liability for misconduct completely unrelated to the Debtor. The Second's Circuit's refusal to do so is inconvenient for Petitioners but provides no support to their baseless claim that the finality of the Confirmation Order is threatened by the Second Circuit's decision. Travelers third argument is, effectively, that bankruptcy court jurisdiction is irrelevant if it is inconvenient to their cause and an old order is implicated. Clearly such a legal analysis is inappropriate.

Petitioners seek a determination from this court that the jurisdiction of the Bankruptcy Court is unlimited and extends to matters which have no effect on or relation to a bankruptcy debtor or its estate. Reaching the result sought by Petitioners requires ignoring the clear language and intent of Congress when it created the laws governing bankruptcy courts as well as decades of clear and well settled rulings from this Court. There is no compelling federal question raised by Petitioners which would warrant an exercise of this Court's jurisdiction, nor are any of the other considerations enunciated in Supreme Court Rule 10 which govern review on a writ of certiorari raised by Petitioners which could possibly warrant an exercise of this Court's jurisdiction.

COUNTER-STATEMENT OF THE CASE

This case involves nothing new, unique, or of vital importance to the bankruptcy judicial system. The Second Circuit Court analyzed, followed, and applied long-standing, well-founded, preexisting legal guidelines in reaching its decision. Its ruling is not based on an improper application of law, nor does it adversely impact any other case. Its ruling merely applies what has long been the jurisdictional rule for bankruptcy courts. Petitioners, by contrast, seek to create unlimited jurisdiction for the Bankruptcy Court. They did this by reopening the Confirmation Order before the Bankruptcy Court in order to torture its interpretation beyond its clear and plain language, and by seeking to enjoin legitimate state court actions that have no relation to nor conceivable effect on the Debtor or its estate. None of the issues presented by Petitioners are novel, with perhaps the sole exception of the size and age of the Johns-Manville bankruptcy case itself. Also, none of the issues framed by Petitioners' disguise the fact that they seek unlimited jurisdiction for the Bankruptcy Court as a method of avoiding their independent liability for their own conduct and failures made actionable by state law and not included in the scope of the Confirmation Order's injunction.

The Confirmation Order was entered on December 22, 1986, by the Bankruptcy Court. *In re Johns-Manville Corp.*, 2004 WL 1876046, 2 (Bankr. S.D.N.Y. 2004). A week earlier, on December 18, 1986, the Bankruptcy Court entered an order approving

settlement agreements with certain Johns-Manville insurers (herein the "Insurance Settlement Order").[2] *Id.* The Insurance Settlement Order enjoined the commencement of certain proceedings against a group of insurance companies which had provided coverage to Johns-Manville, including Travelers, and channeled these actions to a settlement trust. The Confirmation Order incorporated by reference the Insurance Settlement Order.

Subsequently, lawsuits were filed in Louisiana, Massachusetts, Texas, and West Virginia by plaintiffs seeking recovery from Travelers (the "Common Law Suits"). The Common Law Suits were founded on state common law allowing for direct actions against insurers, as opposed to being based on state statutes allowing direct actions. The Common Law Suits sought damages from Traveler's because of its independent misconduct in its investigation, defense and settlement of asbestos claims against its insureds. None sought recovery from the insurance policies issued by Travelers to Johns-Manville.

On June 19, 2002, Travelers filed a Motion for Temporary Restraining Order and Preliminary Injunction in the Bankruptcy Court to enjoin these suits. *In re Johns-Manville Corp.*, 2004 WL 1876046 at 1. Travelers did not file to remove the Common Law Suits to the Bankruptcy Court, though now Petitioners assert that the Bankruptcy Court has

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[2] Travelers' App. 210a.

jurisdiction over those actions. Rather, Travelers asserted that the Common Law Suits were barred by the injunctive relief in the Bankruptcy Court's Confirmation Order. *Id.* At the same time, Travelers entered into settlement negotiations with the holders of some of the claims asserted in the Common Law Suits, those represented before this Court by the CLSC. *Id.* These negotiations resulted in the Common Law Settlement Approval Order entered by the Bankruptcy Court approving the settlement terms reached. *Id.* The settlement terms included an injunction barring all of the Common Law Suits. *Id.* It is this order which is being appealed and is at issue before the Court, not the Confirmation Order.

Respondents, the Cascino Asbestos Claimants, non-settling holders of Common Law Suits, timely objected to the proposed settlement approved by the Bankruptcy Court. On appeal to the United States District Court for the Southern District of New York (the "District Court"), the decision of the Bankruptcy Court approving the settlement and enjoining the Common Law Suits was affirmed. *In re Johns-Manville Corp.*, 340 B.R. 49 (S.D.N.Y. 2006), order vacated by, *In re Johns-Manville Corp.*, 517 F.3d 52 (2nd Cir. 2008). On further appeal to the Second Circuit, the decision of the Bankruptcy Court was reversed. *In re Johns-Manville Corp.*, 517 F.3d 52 (2nd Cir. 2008), petitions for cert. filed, 77 U.S.L.W. 3121 (Sep. 04, 2008) (No. 08-295), and 77 U.S.L.W. 3122 (Sep. 04, 2008) (No. 08-307). The basis for the decision of the Second Circuit was that the

Bankruptcy Court lacked jurisdiction to enjoin the Common Law Suits. *Id.* at 68.

Therefore, at its core what this case involves is a simple and fundamental axiom of bankruptcy law, that "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction." *Central Virginia Community College v. Katz*, 546 U.S. 356, 370 (2006), citing, *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440, 447 (2004). There is nothing novel in the Second Circuit's decision as urged by Petitioners because "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*." *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). The reasoning underlying the decision of the Second Circuit has no bearing on the finality of confirmation orders, as the Confirmation Order's *finality* was at no point questioned by the Second Circuit. In addition the Confirmation Order is not the order of the Bankruptcy Court on appeal. Nor does the Second Circuit's reasoning have any relationship to the supremacy clause. Because jurisdiction extends to the interest of the Debtor in its *res*, the Second Circuit correctly looked to state law to determine the nature of the interests comprising the *res*. That Petitioners do not like the applicable state law is hardly a compelling reason for granting a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners' grounds for seeking a writ of certiorari are woefully short of those set out in Supreme Court Rule 10. The Second Circuit Court's decision does not conflict with another United States Court of Appeals. No important federal question was decided in a way that conflicts with a decision of a state court of last resort. The ruling for which review is sought does not depart from the accepted and usual course of judicial proceedings and is, in fact, consistent with every other ruling on these issues.

I. COMMON LAW SETTLEMENT COUNSEL RAISE NO COMPELLING REASON FOR AN EXERCISE OF THIS COURT'S JURISDICTION.

The lower court's decision announced no new law, did not overrule prior precedent, and did not improperly narrow the limits of bankruptcy jurisdiction. Rather, the Second Circuit prudently considered and applied existing precedent, much of it from the Johns-Manville case, in reaching its conclusion.

The conclusion of the Second Circuit was that "the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." *In re Johns-Manville Corp.*, 517 F.3d 52 at 55.

The Second Circuit noted the history of the Johns-Manville case, but found that "the current controversy is primarily a question of jurisdiction." *Id.* at 60. It is primarily a question of jurisdiction because, as the Second Circuit stated, "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders . . . clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction." *Id.* at 60-61. That bankruptcy court jurisdiction is limited is not a new concept, since "the ancillary jurisdiction courts possess to enforce their own orders 'is itself limited by the jurisdictional limits of the order sought to be enforced.'" *In re Fairchild Aircraft Corp.,* 184 B.R. 910, 916 (Bankr. W.D. Tex. 1995). Thus, all the Second Circuit's decision does is recognize the jurisdictional limits of the Confirmation Order.

These limits are the same limits which were previously applied in the Johns-Manville case. See *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89 (2nd Cir. 1988) and *In re Davis*, 730 F.2d 176 (5th Cir. 1984). The Second Circuit's decision is in full accordance with its previous decision in *MacArthur,* which has been relied on extensively by Petitioners. Petitioners reliance on *MacArthur* is misplaced. In *MacArthur*, a distributor of Johns-Manville asbestos objected to the 1986 injunction and argued that the Bankruptcy Court lacked jurisdiction to enjoin suits against Johns-Manville's insurers to collect from the proceeds of the Johns-Manville insurance policies. *Id.* at 91. This is a clear factual difference, as the

Common Law Suits do not seek recovery from the proceeds of the Johns-Manville insurance policies. The *MacArthur* Court found that the Bankruptcy Court had jurisdiction to enjoin the suits seeking recovery from insurance policy proceeds. This holding was based upon the Bankruptcy Court's jurisdiction over Johns-Manville insurance policies. The Common Law Suits are related to knowledge gained from an insurance relationship, not to the proceeds of insurance policies, and thus have no effect on the property of the estate. Thus the circumstances at issue for jurisdictional purposes here are qualitatively different. In *Davis*, two hundred and seventy-nine asbestos workers filed suits against Travelers under the Louisiana direct action statute, La.R.S. § 22:655, shortly before Johns-Manville filed its bankruptcy petition. *In re Davis*, 730 F.2d at 178. The asbestos workers moved to vacate the stay arguing that no nexus existed between their suits against Travelers and the Johns-Manville bankruptcy. *Id.* at 183. The *Davis* court refused to vacate the stay citing the Bankruptcy Court's power to protect the property of the estate and the fact that the insurance policies targeted by the statutory direct action plaintiffs were property of the estate. *Id.* at 184. In this case also the decision was based on the fact that recovery was sought from the insurance policies as property of the estate, and so it is again qualitatively different. The Second Circuit recognized this fundamental distinction in *MacArthur* and *Davis*, and quoted *MacArthur* as support, "'[I]n both instances, third parties seek to collect out of the *proceeds* of Manville's insurance

policies on the basis of Manville's conduct. . . . [P]laintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets.'" *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2nd Cir. 2008), quoting *MacArthur*, 837 F.2d at 92-93.

The jurisdictional limits upon which the decision of the Second Circuit is based are also the same limits outlined by this Court in its recent *Katz* decision, to the extent that decision is applicable in the context of this case. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). In *Katz*, a chapter 11 trustee brought an adversary proceeding against certain state funded colleges seeking to avoid alleged preferential transfers by the debtor. *Id.* at 359. The state-funded colleges filed a motion to dismiss the adversary proceeding claiming sovereign immunity. *Id.* The issue raised was whether Congress' attempt to abrogate sovereign immunity in 11 U.S.C. § 106(a), thereby conferring jurisdiction over sovereign entities in certain circumstances, was valid. *Id.* at 361. This is distinct, both factually and with respect to the jurisdictional question raised, from the issues before the Court in this case. Nevertheless, the Second Circuit's decision is clearly congruous with this Court's decision in *Katz*. This Court noted that "Critical features of *every* bankruptcy proceeding are the exercise of exclusive jurisdiction over *all of the debtor's property*, the equitable distribution of that property among the debtor's creditors, and the ultimate

discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts" [emphasis added]. *Id.* at 364-365. Additionally, this Court affirmed that "In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.'" *Id.* at 370, quoting *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). It is true, as raised by Petitioners, that "generally, courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications." *Id.* at 370. However, nothing raised by Petitioners is sufficient to show that the Bankruptcy Court's order enjoining the Common Law Suits was in any way "ancillary" to its enforcement of its *in rem* jurisdiction over the *res*. Rather, the fact that the Common Law Suits seek no recovery from the *res* shows that the Bankruptcy Court's order cannot be ancillary to an *in rem* adjudication because they have no conceivable effect, ancillary or otherwise, on the *res* over which the Bankruptcy Court has jurisdiction. Therefore the decision of the Second Circuit is clearly within the confines of *Katz*, and does not re-define the limits of bankruptcy jurisdiction. Rather it simply applies the limits of that jurisdiction as they were recognized by this Court in *Katz*.

CLSC also urges that the Second Circuit fails to grasp the difference between subject matter jurisdiction and statutory authority. They posit that it was not relevant to the determination of this cause whether the bankruptcy court had jurisdiction over

the subject of its purported injunction so long as it has jurisdiction to confirm a plan of reorganization. This argument is inapposite, as any court's power is limited by its jurisdiction. A determination of whether jurisdiction is present must be made before any statutory relief is available. No party to this case disputes that the Bankruptcy Court had jurisdiction to confirm a plan of reorganization for Johns-Manville. The issue is whether it had jurisdiction over the claimants asserting the Common Law Suits it sought to enjoin. The Second Circuit Court correctly considered the jurisdictional issues, stating that "The fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third party non-debtor claims. Here, as in *Zale*, Plaintiffs seek to recover directly from a debtor's insurer for the insurer's own independent wrongdoing. Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers." *In re Johns-Manville*, 517 F.3d 52, 65 (2nd Cir. 2008), citing, *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). It is clear then that the Second Circuit clearly understood the difference between subject matter jurisdiction and statutory authority. The Bankruptcy Court clearly had statutory authority to enter the Confirmation Order, and had subject matter jurisdiction over the *res* of the Johns-Manville estate. The Second Circuit never

questioned the statutory authority of the Bankruptcy Court to enter the Confirmation Order, only its subject matter jurisdiction over the claimants who assert the Common Law Suits.

Finally, CLSC argues that the ruling of the Second Circuit somehow brings into question the principle of finality. Their argument is that because the Confirmation Order was entered over 20 years previously, it cannot now be questioned. This argument misstates the circumstances of this proceeding. As previously set out herein, the order subject to this appeal is not the Confirmation Order which was entered over 20 years ago. It is an order seeking to modify and extend the effect of the Confirmation Order which was sought and obtained by Petitioners. This new order is sought by Petitioners in order that the Confirmation Order would apply to claims and third parties over which the Bankruptcy Court clearly lacks jurisdiction. As the Second Circuit stated, "global finality is only as 'global' as the bankruptcy court's jurisdiction. A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions." *In re Johns-Manville*, 517 F.3d at 66.

II. TRAVELERS RAISES NO COMPELLING REASON FOR AN EXERCISE OF THIS COURT'S JURISDICTION.

Petitioners, Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers

Property Casualty Corp., raise three grounds which they assert support this Court's exercise of jurisdiction over this proceeding. One is essentially the same argument regarding "finality" as urged by the CLSC, and the Court is referred to Respondent's comments above as to that issue. See Travelers' *Petition for Writ of Certiorari*, Pg. 6.

Travelers also argues, as did CLSC, that the Second Circuit was incorrect when it held that jurisdiction was lacking because the enjoined actions had no effect on the *res* of the debtor or its estate. See Travelers' *Petition for Writ of Certiorari*, Pg. 13. They cite this Court's ruling in *Katz* in support of their position. *Katz,* 546 U.S. at 356. However, as already stated, the Second Circuit's ruling is fully consistent with this Court's decision in *Katz.* For example, and in addition to the discussion of *Katz* above, this Court stated that "Bankruptcy jurisdiction, at its core, is *in rem.*" *Katz*, 546 U.S. at 362, citing, *Gardner v. New Jersey,* 329 U.S. 565, 574 (1947). This Court also stated that "Then as now, the jurisdiction of courts adjudicating rights in the bankruptcy estate included the power to issue compulsory orders to facilitate the administration and distribution *of the res*" [emphasis added]. *Id.* at 362. Clearly this Court held that ancillary actions by a bankruptcy court necessary to enforce its *in rem* adjudications are appropriate. However, the *Katz* decision falls woefully short of what is urged by Petitioners, i.e., that jurisdiction is present when the actions enjoined have no effect of any kind on the *res* and do not involve the Debtor.

Finally, Petitioners urge a strained interpretation of the Second Circuit Court's ruling to argue that it finds state law preempts a bankruptcy court's ruling. See Travelers' *Petition for Writ of Certiorari*, Pg. 16. A closer analysis of the ruling finds that this was not the rationale behind the Second Circuit's decision. The Second Circuit pointed out that before jurisdiction over the actions can be determined, the nature of the actions must be reviewed (which the lower courts did not do) and that their potential affect on the Debtor and its estate analyzed. *In re Johns-Manville Corp.*, 517 F.3d 52 at 62. The nature of the actions is determined by state law and is not changed by any ruling of the bankruptcy court. The Second Circuit compared injunctions sought in other cases of state law claims with those sought to be enjoined in this action. In every case where an injunction was valid, the underlying actions would have reduced or interfered with the Debtor's estate. See *In re Davis*, 730 F.2d 176 (5th Cir. 1984); *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89 (2nd Cir. 1988); see also *In re Johns-Manville Corp.*, 97 B.R. 174 (Bankr. S.D.N.Y. 1989); *In re Johns-Manville Corp. v. Colorado Ins. Guar. Assoc.*, 91 B.R. 225 (Bankr. S.D.N.Y. 1988). In the actions involved here, there is no such impact. Petitioners misstate the Second Circuit Court's ruling in this regard.

CONCLUSION

For all of the reasons discussed herein, Petitioners have failed to show that the Second Circuit's decision is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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Dated: November 5, 2008

REPLY BRIEF

No. 08-295

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nothing in the more than 80 pages of opposition briefs obscures the extraordinary nature of this case, which concerns the scope of Congress's constitutional authority to enact "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, and the power of federal courts to render final, binding judgments.

This case is an ideal vehicle for resolving the Questions Presented. The decision below rests solely on the disputed jurisdictional question. And with a quarter-century of proceedings below, the case is nothing if not ripe for final resolution by the United States Supreme Court.

A. The Salient Facts Are Clear and Undisputed

Respondents imply that the Manville bankruptcy is too "unique," "unusual" or "esoteric" to warrant this Court's attention. *E.g.*, Chubb Opp'n at 18. In reality, the pertinent facts are straightforward and undisputed:

- In 1986, Bankruptcy Judge Burton R. Lifland entered a confirmation order barring "any Person" from commencing "any claims" "based upon, arising out of or related to" insurance policies that Travelers issued to Manville. (App. 439a, 446a). Judge Lifland's order was challenged on direct appeal as exceeding the subject matter jurisdiction of bankruptcy courts, but was affirmed *in toto* by the Second Circuit in 1988.

Co. v. Johns-Manville Corp., 837 F2d 89, 90 2d (2d cir. 1988) (App 190a–191a).

- In 2004, Judge Lifland found as a matter of fact that his injunction was being violated by a new species of asbestos-related lawsuits (referred to below as the "direct action" claims). Specifically, in a detailed set of Findings of Fact and Conclusions of Law, *see In re Johns-Manville Corp.*, 2004 WL 1876046 (Bankr. S.D.N.Y. 2004) (App. 101a–187a), Judge Lifland found that these new asbestos claims were part of a global strategy developed by the plaintiffs' bar to put Petitioners "in Manville's chair" and thereby hold Petitioners liable on account of their insurance relationship with Manville.
- In 2008, on appeal from the enforcement proceedings, the Second Circuit accepted Judge Lifland's factual finding that the direct action claims "arise out of" the insurance policies Travelers sold to Manville, and thus fall within the plain language of the 1986 confirmation order. *In re Johns-Manville Corp.*, 517 F.3d 52, 67 (2d Cir. 2008) (App. 33a). Yet rather than enforce the confirmation order as it was originally written, entered and affirmed, the court of appeals ruled that Judge Lifland had somehow exceeded the "subject matter jurisdiction" granted by the Judicial Code. The Second Circuit concluded that the bankruptcy court ***in 1986*** was "without power to enjoin all claims that literally 'arise out of' the insurance policies that

Manville purchased from Travelers." *Id.* at 67 n.24 (App 33a n.24).

These facts are undisputed. And the "facts" raised in the opposition briefs—including lengthy digressions into after-acquired affiliates of Petitioners, the particulars of legal briefing from the 1980s, and the nature of the state-law "direct action" claims—are irrelevant. What matters is that certain claims were enjoined in 1986; the injunction was affirmed on direct appeal; and twenty years later, a different panel of the same court of appeals refused to enforce the 1986 injunction as it was written.

B. The Legal Issues Are of Vital National Importance

The decision below is unprecedented. The court of appeals decided the case on the broadest ground possible, attempting to define "the outer reaches of a bankruptcy court's jurisdiction." *In re Johns-Manville Corp.*, 517 F.3d 52, 55 (2d Cir. 2008) (App. 6a). Then, approaching the case as though it was a direct appeal of the 1986 confirmation order, the Second Circuit effectively rewrote its own earlier affirmance of the Manville confirmation order and instead announced a new test for the scope of bankruptcy jurisdiction: "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66 (App. 31a).

The Second Circuit's newly announced *res*-based test has no basis in the Constitution, the Judicial Code, the Bankruptcy Code, or the case law. No other court of appeals has adopted any-

thing like it. Nor has any other court held that the scope of *federal* bankruptcy jurisdiction is somehow tethered to *state* law. Indeed, the decision below is so far afield that all three of Respondents' opposition briefs attempt to minimize or obscure the actual holding of the court of appeals.

Chubb, for example, conspicuously ignores the court of appeals' use of state law to limit federal bankruptcy jurisdiction, and suggests that "[w]hile much of [the court of appeals'] opinion is couched in terms of jurisdictional limitations, the Second Circuit was actually reviewing the Bankruptcy Court's *interpretation* of its 1986 Injunctions." Chubb Opp'n at 12. The Cascino Asbestos Claimants also seek to reinterpret the decision below, yet their explanation is the opposite of Chubb's; "the order subject to [*sic*] this appeal is not the Confirmation Order which was entered over 20 years ago." Cascino Opp'n at 16.

The Second Circuit's ruling speaks for itself:

> In our view, the [bankruptcy] court lacked ***subject matter jurisdiction*** to enjoin claims against Travelers that were predicated, as a matter of ***state law***, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and ***the res of the Manville estate***.

In re Johns-Manville Corp., 517 F.3d at 68 (App. 35a–36a) (emphasis added). No Respondent attempts to defend or explain that manifestly incorrect holding, which will constitute binding

law in the Second Circuit unless and until this Court rules otherwise.

Even more so than other areas of the law, "Bankruptcy is an intensely practical affair." *In re Cooper Commons LLC*, 512 F.3d 533, 534 (9th Cir. 2008). The rules must be clear and uniform—and, once a confirmation order is entered and affirmed in full (as the Manville confirmation order was affirmed by the Second Circuit in 1988), parties must be able to rely on the enforcement of that order. The decision below serves none of these ends.

Here, Congress empowered the federal courts to provide injunctive relief to protect a limited class of non-debtors from claims "aris[ing] by reason of . . . the third party's provision of insurance to the debtor or a related party" in exchange for a "fair and equitable" contribution by the third party to a special trust for victims of asbestos exposure. 11 U.S.C. §§ 524(g)(4)(A)(ii) & (B)(ii) (App. 475a, 477a). The channeling injunction pioneered in the Manville bankruptcy and codified in Sections 524(g) and (h) of the Bankruptcy Code contains rigorous procedural safeguards that carefully balance the need to compensate future claimants with the necessity of providing certainty and repose to the insurance companies that contribute the bulk of the funds to these "524(g) trusts."

The decision below threatens drastically to reduce, if not eliminate, the incentive for insurers to contribute the monies necessary to make 524(g) trusts the vehicle for distribution of assets to asbestos victims. And by effectively rewriting a long-final confirmation order (at precisely the

time when its enforcement was necessary), the court of appeals gave enterprising plaintiffs' lawyers an "end run" around a final federal court judgment. Nothing in any of Respondents' opposition briefs rebuts these critical facts.

C. This Case is Ripe for Resolution

The Chapter 11 case in which these proceedings arise has been pending before the bankruptcy, district and circuit judges of the Second Circuit since 1982. The confirmation order enforced by the bankruptcy court was issued in 1986, and was affirmed on direct appeal in 1988. The enforcement proceedings vacated by the decision below were commenced in 2002 and resulted in a bankruptcy court ruling in 2004. The bankruptcy court's ruling was affirmed in substantial part by the district court in 2006. The district court's affirmance was vacated by the court of appeals in 2008. In light of this extensive procedural history, Respondents' claim that Travelers seeks to "short-circui[t] the ordinary course of the underlying proceedings" (Chubb Opp'n at 17) is untenable.

Certiorari should not be denied on the ground that the decision below is "interlocutory." The Second Circuit ruled that the bankruptcy court lacked "subject matter jurisdiction" in 1986 to "to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to . . . the *res* of the Manville estate." *In re Johns-Manville Corp.*, 517 E.3d 52, 68 (2d Cir. 2008) (App. 35a–36a). Nothing on remand can alter or expand the scope of the bankruptcy court's sub-

ject matter jurisdiction as now circumscribed by the Second Circuit, an issue that has been finally adjudicated. The fact that the Second Circuit "vacated and remanded" instead of "reversed" is essentially, in this context, a distinction without a difference.

In any event, this Court unquestionably has the power to review even non-final judgments, *see* 28 U.S.C. § 1254(1), and has exercised that power where—as here—there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for *certiorari*. *See, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (vacating court of appeals' decision that, in turn, had reversed dismissal and remanded the case to the district court); *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Here, the issues are clear and have received the considered attention of five federal Judges over the past six years:

- The bankruptcy court held numerous hearings and issued a comprehensive set of Findings of Fact and Conclusions of Law;
- The district court heard oral argument on Respondents' appeal and issued a lengthy published opinion canvassing the issues and agreeing with Judge Lifland; and
- The court of appeals heard oral argument on Respondents' further appeal and also issued a lengthy published opinion.

Nothing is more fundamental to the further administration of the case than the court's erro-

neous conclusion that the Bankruptcy Clause does not authorize subject matter jurisdiction to reach beyond the *res* of the estate.

Finally, there already ***is*** a final judgment in this case—the bankruptcy court's original confirmation order, entered in 1986 and affirmed on direct appeal in 1988. Petitioners are seeking to avail themselves of the protections embodied in that confirmation order. The bankruptcy court agreed with Petitioners that a violation had been shown, and the district court affirmed that conclusion. The decision below by the court of appeals effectively unwinds the certainty and repose that otherwise inhere in a final federal court judgment. The time is ripe to reverse that decision.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

107

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No. 08-295

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY ET AL.,

Petitioners,

v.

PEARLIE BAILEY ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.2(b), Property Casualty Insurers Association of America ("PCI") hereby moves for leave to file the attached *amicus curiae* brief in support of the petition for certiorari in this case.

PCI is a trade group that represents its members' interests before state and federal courts and other governmental bodies. PCI's members include more than 1000 property and casualty insurance companies. PCI members write $198 billion in annual premiums, nearly 40.5 percent of all the property casualty insurance written in the United States. PCI members write 51.6 percent of the nation's auto insurance, 39.7 percent of the homeowners policies, 33.2 percent of the commercial property and liability market, and 38.7 percent of the private workers compensation market.

PCI members have insured companies facing asbestos liability and have therefore been involved with asbestos litigation and have acquired significant knowledge of the issues in this case. PCI members have also insured numerous companies that filed for Chapter 11 bankruptcy protection. Because of its substantial experience with asbestos litigation and bankruptcy reorganizations, PCI is well-positioned to provide this Court with information on the practical consequences of the Second Circuit's holding. Moreover, PCI's members will be directly affected by the resolution of this case, as many have contributed substantial funds in bankruptcy reorganization

proceedings in exchange for injunctions against future suits based on resolved claims, and many are likely to be involved in such proceedings in the future.

Counsel for proposed *amicus* made a good-faith effort to obtain the consent of all parties to the filing of its brief. Petitioners have consented to the filing of this brief, but counsel for proposed *amicus* received no response from respondents to their request for consent.

Wherefore, PCI respectfully moves for leave to file this brief.

Respectfully submitted,

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October 6, 2008

INTEREST OF *AMICUS CURIAE*[1]

Property Casualty Insurers Association of America ("PCI") is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. As discussed in the Motion for Leave to File Brief, *supra*, at 1, PCI's members issue a substantial portion of the nation's property casualty insurance.

PCI has substantial experience with the issues raised in this case, *see supra*, at 1, and its members are likely to be directly affected by the outcome of this case. Along with numerous other third parties that have been involved in reorganization proceedings, PCI members have relied on bankruptcy courts' guarantees of finality and have an interest in ensuring that this finality is not disturbed.

PCI also has an ongoing interest in ensuring that bankruptcy courts are able to efficiently devise and manage bankruptcy reorganization plans. The Second Circuit's decision threatens to undermine the finality of past reorganizations in which PCI members have participated, and to cripple bankruptcy courts' abilities to implement reorganizations in the future.

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, consent of all parties of record was requested ten days in advance of the filing of this brief, but was not received, necessitating the motion that precedes this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party or counsel make a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Nearly two decades ago, in a landmark Chapter 11 proceeding, the bankruptcy court confirmed a reorganization plan that established a trust to compensate individuals exposed to asbestos. Central to the establishment of the trust was an injunction barring claims against insurers of the debtor "based upon, arising out of or related to" the insurance policies at issue. Pet. App. 357a. By holding that the bankruptcy court was powerless to enjoin "artfully pleaded" claims resting on the same factual predicate as the settled claims, the Second Circuit's decision in this case undercuts a plan that has been in place for two decades and sharply circumscribes the authority of bankruptcy courts based on a purely formalistic construction of the bankruptcy court's jurisdiction. The Second Circuit's decision is likely to have broad effects that will threaten the finality of numerous completed reorganizations and undermine bankruptcy courts' ability to effectively implement future reorganizations. Thus, this Court's review is warranted.

BACKGROUND

As the bankruptcy court recounted, "[f]undamentally, the story of asbestos health litigation is the story of Johns-Manville" ("Manville"). Pet. App. 105a. "[F]rom the 1920's until the 1970's [Manville] was both the largest manufacturer of asbestos-containing products and the largest supplier of [raw] asbestos in the United States." Pet. App. 106a (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 742 (E. & S.D.N.Y. 1991)).

Petitioner Travelers was Manville's primary insurer from 1947 through 1976. Pet. App 111a-12a. "Travelers, in its role as Manville's insurer, assisted Manville in identifying asbestos dust hazards and establishing dust control programs," Pet. App. 114a-15a, conducted "surveys and inspections . . . in accordance with the [insurance] policies," Pet. App. 115a, "inspect[ed] certain Manville plants, test[ed] the levels of asbestos dust at Manville facilities, and evaluate[d] workers' asbestos exposure pursuant to its underwriting activities," *id.*, and, under the terms of the policy, agreed to defend Manville "in the event of a covered loss," Pet. App. 114a.

In the 1960's and 1970's, "Manville became the target of a growing number of products liability lawsuits." Pet. App. 7a. In 1982, Manville filed for Chapter 11 protection. *Id.* Due to the nature of the liability at issue, which involved the potential for claims years after exposure to asbestos, "[t]he bankruptcy filing was without precedent." *Id.* The bankruptcy court crafted a comprehensive reorganization plan, the "cornerstone" of which was an insurance settlement order that required Travelers to contribute "nearly $80 million to the bankruptcy estate in exchange for an injunction that channeled all claims related to policy claims to the Manville Trust and a complete release for Travelers of liabilities that were related to or based on Manville." Pet. App. 44a. The injunctions were issued under 11 U.S.C. 105(a), Pet. App. 224a, which authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary to carry out the provisions of [Title 11]," and is often invoked by courts to enjoin claims against third parties to

preserve the property of the estate, *see Quigley Co. v. Coleman*, 361 B.R. 670, 675 (Bankr. S.D.N.Y. 2007).

The insurance settlement order, which was incorporated into the order confirming the reorganization plan, provided that "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group." Pet. App. 446a. The order defined "Policy Claims" as:

> [A]ny and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the [Manville] Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

Pet. App. 357a.[2]

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[2] The order confirming the reorganization plan included another injunction barring claims against insurers:

> All Persons and Governmental Units are hereby stayed, restrained and enjoined from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or, receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation [including] . . . [c]ommencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding . . . against or affecting . . . any of the Settling Insurance Companies . . . .

Pet. App. 286a.

Several parties appealed from the order confirming the reorganization plan. The district court upheld the order, Pet. App. 209a, and the U.S. Court of Appeals for the Second Circuit affirmed, holding that "the [bankruptcy] court had authority to issue the injunctive orders pursuant to its power to dispose of a debtor's property free and clear of third-party interests and to channel such interests to the proceeds of the disposition," Pet. App. 191a.

In 1994, Congress enacted 11 U.S.C. 524(g), which codified the channeling and injunction method used in the Manville plan. Pet. App. 19a-20a. Section 524(g)(4)(A)(ii) authorizes injunctions against third parties:

> [A]n injunction may bar any action directed against a third party who is . . . alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party . . . .

11 U.S.C. 524(g)(4)(A)(ii).[3]

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[3] In addition to insurers, the provision authorizes injunctions barring claims against other non-debtors

> to the extent [their] alleged liability . . . arises by reason of . . . the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor; . . . the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party; . . . or [] the third party's

Despite the bankruptcy court's injunction, respondents sued Travelers under common law and state statutes, alleging that Travelers knew about the dangers of asbestos and influenced Manville's decision not to disclose that information in violation of state laws prohibiting unfair insurance trade and settlement practices and that Travelers violated duties to disclose information about asbestos that it acquired from Manville. Pet. App. 10a-11a. Some respondents claimed, for example, that Travelers violated these state laws by "participating in the fraudulent perpetuation of the state of the art (or 'no duty to warn') defense." Pet. App. 10a. In support of these claims, respondents cited conduct directly relating to the provision of insurance. Respondents alleged that "*[u]nder the contracts of insurance* . . . insurers were bound to investigate and provide lawyers and financing to defend manufacturers and sellers in the asbestos litigation, and the insurers possessed the right to control the defense," Pet. App. 141a (emphasis added), and their complaints "suggest[ed] that [Travelers was educated about the state of the art defense] in the course of Travelers' fulfillment of its duty to defend Manville under the policies," Pet. App. 142a. Other respondents who claimed that Travelers violated common law duties by not "disclos[ing] what it learned from Manville," Pet. App. 143a, relied on similar conduct, alleging, for

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involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party . . . .

11 U.S.C. 524(g)(4)(A)(ii).

example, that "Travelers wrote memoranda about the potential litigation crises that would arise from asbestos, *again based on its insurance relationship with Manville*," Pet. App. 144a (emphasis added). The claims were, however, nominally pled against Travelers alone, and respondents alleged, on that basis, that the claims were not precluded by the injunction.

In 2002, Travelers moved the bankruptcy court to enjoin these suits on the ground that they violated the injunction. Pet. App. 87a. The court found that all of the actions were essentially based on allegations that Travelers had acquired information about asbestos hazards from Manville and failed to disclose, or intentionally suppressed, this knowledge. Pet. App. 141a-47a. The court also found that "Travelers['] knowledge of the hazards of asbestos arise from, are based upon and relate to its obligations under the policies it issued to Manville," Pet. App. 128a (capitalization omitted), and that "[e]very dollar paid by Travelers on account of Manville . . . correlated to a specific provision in the [insurance policies]," Pet. App. 30a. The court concluded that the evidence was "extensive and unrebutted":

> [N]o other Travelers policyholder was sued in the number of asbestos cases in which Manville was sued, no other Travelers policyholder commanded the degree of Travelers resources as Manville, no other Travelers policyholder was involved with asbestos as prominently and extensively as Manville had, and no other Travelers policyholder assumed such a prominent

> leadership role in the formulation of cooperative efforts to defend asbestos-related litigation as Manville did.

Pet. App. 131a.

Moreover, the court found that "[i]f the Direct Action Claimants had been compensated 100% by either Manville or the Manville Trust, they would have no economic basis to bring claims against Travelers for its Manville-related conduct" because "all such injuries would have been paid 100%." Pet. App. 176a. Respondents were "dissatisfied with their inability to collect directly from Manville, and thus [were] attempt[ing] to collect Manville's debts" from Travelers, Pet. App. 143a, through their "creative efforts," Pet. App. 181a.

The court concluded that because the evidence "establishe[d] that the gravamen of [respondents'] [c]laims were acts or omissions by Travelers arising from or relating to Travelers['] insurance relationship with Manville," the claims "based on such actions or omissions necessarily 'arise out of' and 'related to' the Policies." Pet. App. 173a. Accordingly, the court held that the claims were barred by the injunction. Pet. App. 169a.

Three insurers – Continental Casualty Company, Chubb Indemnity Insurance Company, and OneBeacon America Insurance Company – and several asbestos claimants (respondents here) appealed from the bankruptcy court's order. The district court adopted the bankruptcy court's factual findings. Pet. App. 41a.

The court found that the suits were attempts to circumvent the injunction by "remov[ing] the connection to Manville by artful pleading," Pet. App.

64a, in an effort to recover for personal injuries caused by Manville's products. The court concluded that the bankruptcy court's analysis was "persuasive and unrebutted." Pet. App. 66a. The court explained that, "[b]ecause Travelers' knowledge of asbestos and conduct in defending Manville arises from the Manville insurance policies, and because the Direct Action claimants were attempting to recover additional funds for asbestos claims that they were unable to collect from the Manville Trust," respondents' suits "were, in fact, creatively pleaded attempts to collect indirectly against the Manville insurance policies." Pet. App. 65a. Thus, "barring these claims was a proper exercise of jurisdiction." Pet. App. 65a-66a.

Respondents appealed, alleging that the bankruptcy court's injunction exceeded that court's authority and thus was unlawful. The Second Circuit agreed and vacated the district court's order. Pet. App. 36a. The court accepted the bankruptcy court's factual findings, including the finding that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." Pet. App. 14a. The court furthermore noted that although respondents "argued that their injuries were separate and independent from those incurred from asbestos exposure, each had experienced personal injury from some form of asbestos exposure." *Id.* The court further agreed with the district court that "the Direct Action claims against Travelers 'inescapably' relate to its insurance relationship with Manville," Pet. App. 32a, and noted the district court's conclusion that the claims were "creatively pleaded attempts to collect *indirectly* against the Manville insurance policies," Pet. App. 15a. Based on these findings, the

court concluded that "[t]here is little doubt that, in a literal sense, the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville." Pet. App. 33a.

The court of appeals nonetheless determined that the bankruptcy court lacked jurisdiction to enjoin the suits. The court held that the district court's jurisdictional analysis, which focused on the factual predicate of the claims and respondents' connections to prior proceedings, was flawed. Pet. App. 21a. In the view of the court of appeals, in order to determine whether respondents' claims sought recovery for "[Traveler's] own independent wrongdoing," Pet. App. 29a, and thereby fell outside the bankruptcy court's jurisdiction, the bankruptcy court was required to look exclusively to the elements of each state law and common law claim to determine whether recovery was contingent on establishing Manville's liability, Pet. App. 24a. Thus, the bankruptcy court would be on "sound jurisdictional ground" in barring claims based on the Louisiana direct action statute, Pet. App. 26a, which "does not create an independent cause of action against the insurer," Pet. App. 22a, but instead "merely grants a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured," *id.* However, the bankruptcy court could not enjoin a claim under West Virginia law, which creates a direct right of action purely against the tortfeasor's insurer for "bad faith insurance practices." Pet. App. 25a. Because some of the laws at issue allowed claims to be pled directly against third parties, the court concluded that "the bankruptcy court had no jurisdiction to enjoin [respondents'] claims." Pet. App. 29a.

The court concluded that 11 U.S.C. 524(g) "must be interpreted in the same manner." Pet. App. 34a. Because, under the court's analysis, respondents' claims were not formally derivative of Manville's liability, but instead nominally sought "to recover directly from Travelers for its own alleged misconduct," they were not encompassed by the statute. Pet. App. 35a.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Formalistic Ruling Negates The Bankruptcy Court's Ability To Devise And Manage Bankruptcy Reorganizations Across A Broad Range Of Cases.

The Second Circuit accepted the factual finding of the bankruptcy and district courts that respondents' "claims against Travelers 'inescapably' relate to," Pet. App. 32a, and "'arise out of [Travelers'] provision of insurance coverage to Manville," Pet. App. 33a, and did not disturb the finding that the claims were an attempt to circumvent the injunctions in order to recover from Travelers for exposure to Manville's asbestos. The court nonetheless concluded that the bankruptcy court lacked jurisdiction to enjoin the actions. The Second Circuit adopted that holding only by applying an exceedingly narrow and formalistic construction of the bankruptcy court's jurisdiction. The court of appeals held that, in order to determine whether respondents in fact sought recovery for Travelers' independent conduct, it was necessary to determine whether recovery under the state law claims was nominally contingent on establishing Manville's

liability. If it was not, then respondents' claims were truly "independent tort actions" that could not lawfully be subject to the bankruptcy court's injunctive power. Pet. App. 26a. Under the court of appeals' analysis, "from a jurisdictional standpoint," the "common nucleus of operative facts" was "of little significance," and it was irrelevant that respondents' suits were attempts to circumvent the injunctions through artful pleading. Pet. App. 33a. In eschewing a practical determination of the bankruptcy court's jurisdiction in favor of a purely formalistic analysis, the court artificially circumscribed the bankruptcy court's jurisdiction and threatened its ability to effectively manage reorganizations.

The Second Circuit's formalistic analysis allows claimants who nominally plead claims against a third party to evade the bankruptcy court's injunction through artful pleading. Analysis of any of respondents' claims demonstrates that they cannot, under anything but a completely artificial analysis, be viewed as seeking recovery for "independent tort[s]." Instead, all of the conduct at issue is inextricably tied to, and indeed arose directly out of, the insurance policies, and the claims are closely related to the personal injury claims channeled to the trust. Some respondents argued, for example, that Travelers' alleged conduct in "propagat[ing] an allegedly-fraudulent 'state of the art' defense," Pet. App. 10a, "amount[ed] to a conspiracy in violation of state laws prohibiting unfair insurance trade and settlement practices," Pet. App. 11a. There is nothing "independent" about that alleged misconduct. Assuming that Travelers developed this defense, it would have done so in direct fulfillment of the terms of the insurance policy, which required it to defend

Manville "in the event of a covered loss," Pet. App. 114a. Moreover, the bankruptcy court, district court, and court of appeals all agreed that Travelers "learned virtually everything it knew about asbestos from its relationship with Manville," Pet. App. 131a, and any knowledge that Travelers had about the hazards of asbestos would have been acquired in the course of meeting its obligations under the insurance policy, which included underwriting the claims, assisting Manville in identifying hazards, conducting surveys and inspections, and defending Manville in litigation. Pet. App. 114a-15a. All of these activities required Travelers to learn about asbestos, and all were undertaken pursuant to the terms of the insurance policy. Thus, not only did Travelers not acquire any knowledge "independently," it also did not develop any defense for Manville "independently."

Rather than considering the facts surrounding the claims and the underlying conduct in determining whether the alleged misconduct was "independent," the Second Circuit counter-intuitively assessed independence by reference to a single factor unrelated to the context of the claims. The Second Circuit's jurisdictional test allows the numerous indicia of a close nexus to be trumped by a single factor: whether the state in which the claim arose allows the claim to be pled by statute or common law directly against the insurer.

The Second Circuit justified its formalistic construction by explaining that a contrary holding would "risk[] federal bankruptcy courts 'displac[ing] state courts for large categories of disputes in which some[one] . . . may be bankrupt.'" Pet. App. 33a (quoting *Feld v. Zale Corp.*, 62 F.3d 746, 754 (5th Cir.

1995)). The court's concerns are misplaced. A practical construction of jurisdiction that focuses on the nexus between the claims at issue and the settled claims, the degree to which those claims rest on a shared factual premise, and the role of the litigants in closely related proceedings would provide appropriate limitations for the bankruptcy court's jurisdiction. Those factors informed the bankruptcy court's determination of whether respondents' claims were "based upon, arising out of or relating to" the insurance policies. Pet. App. 357a. Moreover, when, as here, the injunctions are the "cornerstone" of the reorganization plan, Pet. App. 44a, and the claims are so integrally related that the bankruptcy court and the district court found that they were merely attempts to circumvent the injunction by artful pleading, and the Second Circuit did not disturb this finding, there is absolutely no danger of sprawling jurisdiction.

The Second Circuit's formalistic analysis conflicts with this Court's recognition of the broad scope of jurisdiction Congress intended to afford bankruptcy courts. "The jurisdiction of the bankruptcy courts . . . is grounded in, and limited by" 28 U.S.C. 1334(b) and 28 U.S.C. 157(a). *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Section 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Section 157(a) authorizes district courts to refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts

so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex*, 514 U.S. at 307 (internal quotation marks omitted). Rather than heeding this guidance, the Second Circuit adopted a formalistic analysis that will have a detrimental effect on courts' ability to implement reorganizations.

The Second Circuit's approach is also inconsistent with this Court's recognition that "[t]he Bankruptcy Court is a court of equity . . . ." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). The court of appeals' formalistic inquiry robs courts of the flexibility necessary to accomplish efficient and fair reorganizations in order "to grant a fresh start" to debtors, *Marrama v. Citizens Bank*, 549 U.S. 365, 365 (2007) (internal quotation marks omitted). *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367 (1977) (rejecting a formalistic application of Title VII, in part, because Title VII courts were endowed with "equitable powers," and adopting a formalistic interpretation "would be manifestly inconsistent with the historic purpose of equity to [secure] complete justice") (internal quotation marks omitted); *Am. Nat'l Bank & Trust Co. v. Weyerhaeuser Co.*, 692 F.2d 455, 467 (7th Cir. 1982) (formalistic application of a rule inconsistent with "purpose of equity" "to secure substantial justice").

In addition to affecting bankruptcy reorganizations under section 524(g), the Second Circuit's analysis will directly affect proceedings involving 11 U.S.C. 105(a). This provision authorizes bankruptcy courts to "enter injunctions like the channeling injunction of § 524(g) in favor of non-debtor beneficiaries in appropriate circumstances," *In*

re Mid-Valley, Inc., No. 03-35592 JKF, 2004 Bankr. LEXIS 1552, at *84 (Bankr. W.D. Pa. July 16, 2004), and also serves as a safety net for injunctions issued pursuant to section 524(g). Section 105(a) "empowers the bankruptcy court to enjoin parties other than the bankrupt from commencing or continuing litigation," *Kreisler v. Goldberg*, 478 F.3d 209, 215 (4th Cir. 2007) (internal quotation marks omitted), that "threaten[s] the integrity of the bankrupt's estate," *In re Energy Coop., Inc.*, 886 F.2d 921, 929 (7th Cir. 1989). The provision "contemplates injunctive relief in precisely those instances where parties are pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1242 (6th Cir. 1993) (internal quotation marks omitted).

Since the enactment of section 524(g) in 1994, bankruptcy courts handling asbestos-related reorganizations have generally relied on that provision to enjoin claims against third parties. Courts handling other reorganizations have continued, however, to issue injunctions under section 105(a) precluding suit against third parties. *See* Eric D. Greene et al., *Future Claimant Trusts and "Channeling Injunctions" to Resolve Mass Tort Environmental Liability in Bankruptcy: The Met-Coil Model*, BANK. DEV. J. 157, 171-72 (2005). Injunctions issued under sections 524(g) and 105(a) often raise similar issues, including whether the bankruptcy court has jurisdiction to issue the injunction at issue and, because neither provision confers jurisdiction, bankruptcy courts must determine their jurisdiction under 28 U.S.C. 1334(b) and 157(a). Thus, the Second Circuit's jurisdictional holding is equally applicable to section 524(g) injunctions barring suit

against non-debtors in asbestos-related proceedings and to section 105(a) injunctions barring suit against non-debtors in other proceedings.

The Second Circuit's narrow, formalistic determination of the bankruptcy court's jurisdiction threatens courts' authority to effectively manage reorganizations through section 524(g) and 105(a) injunctions. The court's holding creates incentives for plaintiffs to attempt to circumvent injunctions through artful pleading, undermines the finality of completed reorganizations, and threatens bankruptcy courts' ability to induce third parties, including insurers, to submit to reorganizations.

The bankruptcy court found that respondents sued Travelers because they were "dissatisfied with their inability to collect directly from Manville, and thus attempt[ed] to collect Manville's debts by 'Putting New Defendants In Manville's Chair.'" Pet. App. 143a. The court noted that respondents had attempted to circumvent the injunctions through artful pleading and sought to recover on claims that no court had ever recognized. The Second Circuit did not disturb these findings, but instead adopted a formalistic construction of the court's jurisdiction that focused on the elements of the state law claims and rendered these factual findings essentially irrelevant. The court's rigid rule creates a broad license for claimants to evade the bankruptcy court's jurisdiction through artful pleadings and creates incentives for plaintiffs' attorneys to invent causes of action. The decision also forces courts to analyze each element of each individual claim and its applicability to defendants. Particularly considering the near-infinite universe of potential claims and the

significant incentives for plaintiffs' attorneys to sue, the wasted judicial resources and defense costs are likely to be substantial.

II. The Second Circuit's Decision Undermines The Finality Of Completed Bankruptcy Reorganizations.

As a result of the court of appeals' decision, plaintiffs in the Second Circuit can now sue non-debtors that were previously protected by injunctions so long as their claims, under a formalistic analysis, are not contingent upon establishing the liability of the debtor. Although the repercussions of the Second Circuit's holding extend far beyond the present case, because of the scope of the Manville injunction and its significance as a model for other asbestos-related reorganizations, the effects in this case alone are significant enough to warrant this Court's review. The Second Circuit's opinion invites claims against Travelers and other Manville insurers based on the provision of insurance to Manville, even though all parties believed that the injunctions barred claims "against the settling insurers that arise out of or relate to Manville's insurance policies," Pet. App. 194a, and respondents received compensation for such claims.

The Second Circuit's decision will have a direct effect on other completed asbestos-related reorganizations as well, many of which are modeled on the Manville reorganization and use similarly broad language enjoining claims against third parties. *See, e.g., In re Forty-Eight Insulations, Inc.*, 133 B.R. 973, 977 (Bankr. N.D. Ill. 1991) (noting that the settlement agreement and proposed order were modeled on the Manville trust); *In re Joint E. & S.*

Dist. Asbestos Litig., 129 B.R. 710, 776 (E. & S.D.N.Y. 1991). Since the enactment of section 524(g), numerous courts have relied upon that provision to implement effective reorganizations and have often enjoined claims against third parties to induce them to contribute to settlements. *See* Kathy L. Yeatter, *Fumbling Toward Consistency: Valuation of Future Asbestos Personal Injury Claims in Bankruptcy*, 25-9 AM. BANKR. INST. J. 50, 50 (2006). Opportunistic plaintiffs' attorneys, recognizing that injunctions issued under 524(g) are now vulnerable to attack on jurisdictional grounds, are likely to attempt to undermine other asbestos-related reorganizations by aggressively pursuing third parties. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 479, 484-85 (2005) ("[W]hen 'traditional' asbestos defendants file bankruptcy, plaintiffs' lawyers will simply cast their litigation net wider and pull in 'peripheral' defendants that may be 'far removed from the scene of any putative wrongdoing.'"); *id.* at 485 (quoting a "well-known plaintiffs' attorney" as describing asbestos litigation as an "endless search for a solvent bystander").[4] Even if respondents never prevail on the merits,

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[4] *See also* Lester Brickman, *Disparities Between Asbestos and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 518-19, 530-31 (2007) (describing the aggressive tactics used by plaintiffs' attorneys in asbestos litigation); David A. Dana, *Adequacy of Representation After* Stephenson: *A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 324 (2006) ("Plaintiffs lawyers are highly attuned to opportunities for profitable litigation . . .").

insurers – who already contributed huge sums in order to be free of liability – will be forced to bear significant costs defending these claims. *See* Joseph F. Cunningham & James N. Markels, *Attorneys' Fees Incurred in Defending Insurance Policy Non-Covered Claims: Who Pays?*, 2 BROOK. J. CORP. FIN. & COM. L. 69, 69 n.3 (2007) (noting that asbestos litigation is expensive to defend), and may be forced to settle even meritless claims to avoid "an avalanche of copycat suits" that may be provoked by a single loss, David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 493 (1999); *see also* Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 98 (1997) (even through "weak or meritless case[s]," plaintiffs' attorneys may successfully employ a "strategy of inflicting costs to induce settlement").

Because the Second Circuit's holding is equally applicable to injunctions issued under section 105(a), the court's decision threatens to undermine the finality of numerous other reorganizations. Proceeding on the understanding that they possessed "comprehensive jurisdiction" to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate," *Celotex*, 514 U.S. at 307-08, bankruptcy courts have often used broad language, similar to that employed in the injunctions in this case, to enjoin claims against third parties under section 105(a) in other reorganizations in which there is a close nexus between the enjoined claims and the settled claims. In *In re Mid-Valley, Inc.*, No. 03-35592 JKF 2004 Bankr. LEXIS 1553 (Bankr. W.D. Pa. July 21, 2004), for example, the court enjoined claims "based upon, arising out of, attributable to, or in any way causally connected with, any Released Claim

whenever and wherever arising or asserted." *Id.* at *24; *see also Monarch Life Ins. Co. v. Ropes & Gray*, 173 B.R. 31, 41-42 (D. Mass. 1994). As a result of the Second Circuit's decision, such injunctions are now open to challenge on jurisdictional grounds, even if the enjoined claims "'inescapably' relate to" the claims that were previously settled, Pet. App. 32a, and rest on the exact same underlying conduct. Like respondents in the present case, other individuals who were barred from suing non-debtors by section 105(a) injunctions and who received compensation for their claims through settlements can now attempt to collect (for the second time) from third parties under state law causes of action that allow claims to be pled directly against a non-debtor.

III. The Second Circuit's Approach Will Impair The Bankruptcy Court's Ability To Effectively Devise And Manage Future Bankruptcy Reorganizations.

In addition to undercutting bankruptcy reorganizations that are already complete, the Second Circuit's decision will impair bankruptcy courts' ability to effectively manage future reorganizations by significantly limiting courts' authority to enjoin claims against third parties under sections 524(g) and 105(a). Injunctions barring claims against non-debtors are often necessary to preserve the estate or to induce third parties to contribute to settlements. As a result of the Second Circuit's decision, bankruptcy courts may no longer be able to offer third parties the certainty of receiving the protection necessary to induce them to participate in reorganization proceedings and will be unable to effectively manage reorganizations.

Although the Second Circuit's decision will have significant consequences across a broad range of cases, the effect of the court's decision on section 524(g) proceedings is significant enough to warrant this Court's review. Prior to the enactment of section 524(g), courts struggled to develop effective solutions to the mounting asbestos liability faced by companies under increasing financial strain. "Section 524(g) represents a congressional response to the need for an effective mechanism to facilitate reorganization of companies facing massive numbers of asbestos claims." Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 476 (2005); *see also* Eric D. Greene et al., *Prepackaged Asbestos Bankruptcies: Down But Not Out*, 63 N.Y.U. ANN. SURV. AM. L. 727, 728-29 (2008). Section 524(g) has been critical to bankruptcy courts' ability to manage reorganizations involving asbestos claims and will continue to be important in the future as "asbestos litigation continues to increase" and "[d]amage awards have risen steadily." Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 366 (2006); *see also* Yeatter, *supra*, at 50 (noting that asbestos litigation "has shown little sign of abating").

The Second Circuit's holding substantially undermines section 524(g). In order to establish a sustainable method of compensating individuals exposed to asbestos, bankruptcy courts must be able to guarantee third parties finality to induce them to contribute to settlements. As the petition for writ of certiorari explains, "[i]t is finality that has induced insurers to fund asbestos trusts for the benefit of asbestos claimants." Pet. 23. In this case, for

example, the bankruptcy court noted that "insurers would not contribute funds [to the Manville Trust] without receiving assurances that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." Pet. App. 170a-71a. Under the Second Circuit's holding, the bankruptcy court lacks the power to provide finality. If non-debtors remain subject to liability under (and exposed to the costs of defending) various statutory and common law claims that share a factual predicate with the resolved claims, they will lack financial incentives to contribute to trusts. PCI's substantial experience with complex litigation and large-scale bankruptcy proceedings, through its members' provision of insurance, bears out this conclusion. Moreover, under the Second Circuit's formalistic jurisdictional analysis, which depends entirely on whether recovery under a state law claim is contingent on establishing the liability of the debtor, it will be impossible for third parties to predict what type of claims they will be subject to and the scope of their potential liability. And given that claimants will be able to expand the universe of potential claims indefinitely through the "artful pleading" sanctioned by the Second Circuit, the uncertainty faced by third parties will be substantial enough to prohibit most non-debtors from contributing to asbestos settlements. As a result of the Second Circuit's decision, courts will be unable to effectively manage bankruptcy proceedings, and individuals seeking compensation will be forced to sue financially strained debtors or third parties.

The Second Circuit's holding similarly deprives section 105(a) of much of its force. Bankruptcy courts' authority to enjoin claims under section

105(a) is critical to their ability to implement effective reorganizations. Bankruptcy courts have relied heavily on this provision to enjoin claims against third parties, *see* 22 Eric D. Greene et al., *Future Claimant Trusts*, *supra*, at 171-72, and 105(a) orders are likely to play an even greater role in future bankruptcy reorganizations, *see In re Transit Group*, 286 B.R. 811, 815 (Bankr. M.D. Fla. 2002); *see also* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 5 (1998). Not surprisingly, courts have frequently noted that non-debtors would not have contributed funds in reorganizations in the absence of guarantees of finality. *See, e.g.*, *Monarch*, 173 B.R. at 43; *In re Chiles Power Supply Co.*, 264 B.R. 533, 541 (Bankr. W.D. Mo. 2001). Like insurers in asbestos-related reorganizations, third parties in other reorganization proceedings will not contribute to settlements if they continue to face liability for "artfully pleaded" claims that are little more than attempts to circumvent injunctions barring suit. The Second Circuit's holding impairs bankruptcy courts' ability to manage reorganizations across a broad range of contexts and therefore necessitates this Court's intervention.

CONCLUSION

For the foregoing reasons, as well as those outlined in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 2008

JOINT APPENDIX

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(10) (7)

Nos. 08-295 & 08-307

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioners,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 2008
CERTIORARI GRANTED DECEMBER 12, 2008

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APPENDIX A — EXCERPTS FROM MANVILLE MEMORANDUM IN SUPPORT OF APPROVAL OF THE INSURANCE SETTLEMENT AGREEMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 18, 1985

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a
Reorganization Under
Chapter 11

Case Nos. 82 B 11656
Through 82 B 11676 (BRL)

In re

JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

MANVILLE MEMORANDUM
IN SUPPORT OF APPROVAL OF THE
INSURANCE SETTLEMENT AGREEMENT

* * *

By releasing its Insurers, Manville seeks only to uphold the most basic bankruptcy power — the power to enjoin third parties from enforcing their claims against property of the debtor itself once the property has been reduced to a cash fund and those claims have

been channeled or transferred to that fund. Just as in *Wiltse*, if this Court is unable to enter such an injunction, it will be "prevented from properly administering the Bankrupt's estate." The injunction is essential to the marshalling and distribution of Manville's insurance assets — assets which are critical to the estate. Furthermore, as the Court held in *Reconstruction Finance Corp. v. Jacksonville Blow Pipe Co.*, 143 F. Supp. 601, 602-03, when the assets of a bankrupt are disposed of to a third party free and clear of encumbrances, that party has the "right to call upon [the] Court to protect and effectuate its judgment" by injunctive relief.

D. The General Release of the Settling Insurers Is Well Within This Court's Bankruptcy Power

The Objectors argue that the general release of the Settling Insurers from their obligations under the insurance policies constitutes an illicit "discharge" of "independent" third party claims. Such is not the case. Under the Settlement Agreement, Manville releases all rights it had, and all rights others derivatively had, by reason of the policies being compromised and settled.

Contrary to the Objectors' assertions, the Settlement Agreement does not release such claims as claims "based upon [their] own tortious conduct, which [has] nothing to do with the insurers' contractual liability to . . . Manville." A-C Mem. at 30. However, crucial to the Settlement Agreement is this Court's power to release the Settling Insurers from claims brought by

any of the so-called "direct action claimants" — plaintiffs who happen to reside in one of the few States which permit them to bring lawsuits against Manville's Insurers on the Insurers' obligations to Manville. Such direct actions, clearly derivative of Manville's rights under the policies, are covered and would be released.*

Drawing from a deeply flawed analogy to cases involving the release of a "debtor's guarantor" or "co-obligor", the Objectors argue that such "direct action" claimants hold "independent" claims which this Court cannot "discharge." Manville does not dispute decisions holding that this Court would not have the power to "discharge" a guarantor or co-obligor from his obligations to a third party merely because the guarantor or co-obligor was willing to make funds available to the Manville estate. *First National Bank v. Poland Union*, 109 F.2d 54, 56 (2d Cir.), *cert. denied*, 309 U.S. 682 (1940). Such cases are inapposite, however, because none involved property of the estate; each of those cases involved a third party such as a guarantor, a co-obligor, or a shareholder against whom the debtor had no claim. Manville would simply have no claim against any such guarantor as to which it could ask this Court to allow it to compromise and settle; nor would the third party be asserting rights deriving from the debtor. However, the fact that certain asbestos plaintiffs

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* Without entering the fray as to what rights "future claimants" may have under the Bankruptcy Code, any effort by a "future claimant" to assert claims against the Settling Insurers deriving from Manville's insurance policies would, like direct action rights, be included within the release.

have the procedural ability to pursue Manville's claims against its Settling Insurers for their own benefit does not divest this Court of its fundamental jurisdiction to marshal and distribute the assets of the Manville estate.

This Court's power to compromise claims of the debtor even when they are also enforceable by a third party is well recognized by the very cases the Objectors cite in support of their illicit "discharge" allegations. Thus, for example, in *In re 1775 Broadway*, 79 F.2d 108, 110 (2d Cir. 1935), the Second Circuit did hold that the Bankruptcy Court has no jurisdiction to release the independent tort claims certain noteholders of debtor might personally have against an indenture trustee. The Court reasoned that:

> "[c]laims arising from misrepresentation in the sale of notes were not claims . . . that must be settled in order to bring property into the reorganized company." *Id.* at 110.

However, the Second Circuit carefully distinguished such claims from the bankrupt estates' "claims for mismanagement of the trust against the trustee." Even though these latter claims were also held by the individual bondholders, the Second Circuit determined that they were subject to the Bankruptcy Court's jurisdiction. Accordingly, the Court wrote that the Bankruptcy Court "might have ordered [such claims] released after being satisfied that it was fair and just to do so and that sufficient consideration was paid

therefor." *Id.* at 110. In so holding, the Court reasoned as follows:

> "A release of liability for mismanagement of the trust pertained to the trust res to be turned over in the reorganization. The determination as to releasing such liability was a duty cast upon the judge both in the interest of the debtor and of the noteholders. In reaching a determination, the court was obliged to appraise the possibility of success in prosecuting such claims and consider it in the light of the prospects of benefit to the noteholders under the plan of reorganization." *Id.*

Contrary to the Objectors' misperceptions, Manville does not seek to have this Court release its Settling Insurers from any claims by third parties based on the Insurer's own tortious misconduct towards the third party, as opposed to its misconduct towards Manville. Manville seeks only to release the Settling Insurers from the rights Manville might itself have against them or rights derivative of Manville's rights under the policies being compromised and settled. According to the Second Circuit, this Court is "duty" bound to effectuate such a release if it determines that the Settlement Agreement is "fair and just" and "that sufficient consideration was paid therefor." *Id.*

All of the other cases cited by the Objectors are in line with the Second Circuit in recognizing that the

bankruptcy courts lack power to discharge "independent" claims of third parties against nondebtors. These cases do not, however, abrogate this Court's essential power to release claims of the debtor, along with any derivative claims of third parties, against a nondebtor so as to compromise, to settle, and to liquidate all of the assets of the debtor's estate.*

It is precisely because a third-party claim against a guarantor or co-obligor is an "independent" claim not held by the debtor itself that the cases cited by the Objectors declare such claims to be outside of the Bankruptcy Court's jurisdiction to compromise and settle. Thus, in affirming that a trustee in bankruptcy does not have the power to sue an indenture trustee for misconduct on behalf of bondholders, the Supreme Court in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), relied on the fact that "[n]owhere does

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* In two cases cited by the Objectors, the claim against the debtor had been discharged, and the insurer attempted to avoid any payment solely by arguing that the insured had been released. *Pickett v. Carolina Casualty Insurance Co.*, 734 F.2d 793 (11th Cir. 1984); *In re Bracy*, 449 F. Supp. 70, 71 (D. Mont. 1978). The courts, therefore, held that the claims against the insurer were not discharged. A crucial difference between these cases and the instant case is that in neither *Pickett* nor *Bracy* had a payment from the insurer to the debtor or a compromise between the debtor and the insurer provided funds within the jurisdiction of the bankruptcy court from which the claimant could be satisfied. In contrast, the purpose of the Settlement Agreement is to provide a fund for compensation of certain claimants and to obviate their need to proceed directly against insurers.

petitioner argue that Webb & Knapp [the bankrupt] could make any claim against marine [the indenture trustee]." *Id.* at 429.

* * *

The *Law Research* settlement agreement "prescribed in detail the provisions of the arrangement which LRS was to submit for approval." *Id.* at 305. According to the Second Circuit, an essential provision in the agreement was "upon confirmation of the arrangement, the release of Western Union and those associated with it from all claims arising out of the agreement between Western Union and LRS." Manville seeks no more in its Settlement Agreement.

As the Second Circuit in *Law Research* explained:

> "in return for purposes of enabling LRS to propose and effectuate an arrangement under Chapter XI of the Bankruptcy Act, Western Union agreed to pay LRS or such others as the bankruptcy court may direct a 'Compromise Settlement' of $1,440,000 in complete settlement of all claims against it." *Id.*

The settlement agreement was supplemented by a letter which specifically provided for those creditors who held

assignments of the Western Union cause of action. The letter required that LRS consent

> "to appropriate procedures so that sufficient funds will be set aside to enable the satisfaction of claims of allegedly secured creditors to the extent that those claims may be allowed and fixed, which funds will be subject to the jurisdiction of the Bankruptcy Court. . . . *Id.* at 306.

Again, Manville seeks no more than to have the claims of those who derivatively have or can assert Manville's rights under the policies against the Settling Insurers channeled to the settlement fund.

APPENDIX B — EXCERPTS OF MEMORANDUM OF THE LEGAL REPRESENTATIVE OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case Nos.
82-8-11656 Through
82-8-11676 Inclusive
(BRL)

In re

JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

MEMORANDUM OF THE LEGAL REPRESENTATIVE

The Legal Representative submits this memorandum to set forth his position with respect to Manville's application for approval of its settlement agreement with Travelers Indemnity Company, Home Insurance Company, and certain syndicates of Lloyds, London (the Insurance Agreement).

Preliminary Statement

Both the proponents and opponents of the Insurance Agreement have submitted lengthy, careful and well

reasoned memoranda to the Court. Yet, despite the vigor of the arguments presented, a careful reading of these memoranda reveals, we submit, basic agreement on the applicable legal principles and authorities that are determinative of this application. Thus, the major items of dispute seems to be the interpretation of the language of the Insurance Agreement and whether that language places the Insurance Agreement within the appropriate legal standards.

* * *

B. *Scope of the Injunction, Indemnity and Set Off*

All parties seem to agree that any injunction, channeling order and release is limited to this Court's jurisdiction over the *res* and then proceed to disagree as to whether the relevant language of the Insurance Agreement is limited to this Court's *in rem* jurisdiction. Thus we consider it appropriate that the Court find that it has *in rem* jurisdiction over the Policies and that the injunction and channeling order requested is *in rem*.

APPENDIX C — LETTER TO DENNIS J. DREBSKY, PETER KEANE AND PETER SCHLESINGER DATED JUNE 3, 1985

June 3, 1985

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Meagher & Flom
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New York, New York

Peter Keane, Esq.
Lord Day & Lord
25 Broadway
New York, New York 10004

Peter Schlesinger, Esq.
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Dear Dennis, Peter and Peter:

This letter clarifies the intent of the parties with respect to certain provisions of, the Settlement Agreement dated July 18, 1984 between the JM Plaintiffs (as defined in that agreement), and the Settling Insurers (as defined in that agreement), and (if necessary) shall be deemed to be an "amendment" for purposes of Section 13(d) thereof. The relevant provisions, and the agreed upon interpretations, are set forth below:

Appendix C

1. Page 6 – Definition of "JM Responsible Entity." The reference to "M1" in the last sentence of this definition is for illustrative purposes only and was not intended to require in any way that the JM Responsible Entity be the same as or similar to the "M1" entity referred to therein, unless, of course, the October 17, 1983 Plan were to be confirmed.

2. Page 8 – Definitions of "Plan", "Plan Confirmation Date" and "Plan Confirmation Order" – All of these definitions refer to any plan of reorganization that is confirmed irrespective of its terms, who proposes it, or any similarities – or lack thereof - with the Joint Plan of Reorganization dated October 17, 1983. None of these defined terms, or their use at any point in the Insurance Settlement Agreement, was intended to or does impose any obligation with respect to the substance or nature of any plan.

3. Page 15 – Paragraph 2(e) – the phrase "Manville and the JM Debtors agree that this Agreement shall be embodied in and become part of the Plan."

This phrase was not intended to require that the Agreement be a term or condition of the Plan. What was intended is that the Agreement (and any final orders relating thereto) shall survive confirmation of the Plan and be referred to and reaffirmed in the Plan, and the Settlement Agreement's major elements, particularly the injunction and channeling order, be disclosed as part of the plan confirmation process. This disclosure may be accomplished by, *inter alia*, making the Agreement and/or such orders exhibits to the Plan.

Appendix C

4. Page 28 – Paragraph 8(a)(ii) – This Paragraph was not intended to require that provisions (A) through (E) be included in haec verbs in the Plan Confirmation Order. This paragraph will be satisfied if the Plan Confirmation Order reaffirms a final order previously entered containing paragraphs (A)-(E).

5. Page 28 – Paragraph 8(a)(ii.) (B) – This paragraph was not intended to impose any requirements with respect to the ultimate disposition of the Settlement Fund. Nor does it attempt to dictate how, or in what manner, property damage claims shall be dealt with in a plan. Determinations of such matters and who has what interest in the Settlement Fund are, of course, for further order of the Court.

6. Page 37 – Paragraph 12 – The intent of this provision was that the Settling Insurers shall not object to the "Disposition of Settlement Fund Remainder" as it may be treated in a plan.

7. Page 28 *et seq.* and Exhibit E – The injunction and channeling order.

Page 19 *et seq.* – Paragraph 5 – The indemnity.

The court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction. The channeling order is intended only to channel claims against the *res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (*i.e*, the Policies) which

are or may be asserted, against the Settling Insurers. The indemnity serves primarily as a backstop against the failure of the injunction.

8. Page 26 – Paragraph 7 – Paragraph 7 is not intended to inhibit transactions, if any, between the JM Responsible Entity and any JM Insured provided such transactions do not directly or indirectly impair the benefits provided by Paragraph 7(b).

The undersigned are authorized to sign this letter on behalf of their respective clients.

Please sign and return the enclosed copy of this letter.

Sincerely yours,

/s/ _____
Lowell Gordon Harriss

The foregoing is confirmed
on behalf of The Travelers Indemnity Company
on behalf of itself and each of its Affiliates

/s/ _____

APPENDIX D — AMENDED STATUTORY DIRECT ACTION SETTLEMENT AGREEMENT

AMENDED SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT (as defined herein), dated as of March 5, 2004, as amended as of March 26, 2004, made and entered into by and between (i) the Settlement Counsel (as defined herein) on behalf of all Persons (as defined herein) who have asserted Statutory Direct Action Claims (as defined herein) and (ii) The Travelers Indemnity Company and Travelers Casualty and Surety Company (formerly known as The Aetna Casualty and Surety Company);

WHEREAS, Travelers (as defined herein) contests the allegations of the Pending Statutory Direct Actions (as defined herein) and the validity of the threatened lawsuits and any liability thereunder;

WHEREAS, Travelers believes that all direct action claims, including but not limited to the Statutory Direct Action Claims, whether sounding in tort or contract or brought pursuant to statute, are barred by the Confirmation Order and Insurance Settlement Order (as defined herein) entered by the Bankruptcy Court in *In re Johns-Manville Corp.*;

WHEREAS, the Parties (as defined herein) now deem it to be in their best interests to settle and fully and finally compromise in accordance with the terms of this Settlement Agreement all disputes, issues and objections that now exist or might exist in the future between and among them concerning the Statutory Direct Action Claims;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the sufficiency of which is hereby acknowledged, THE PARTIES AGREE AS FOLLOWS:

1. ***Definitions***

(a) "Bankruptcy Code" shall mean Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq., as amended from time to time.

(b) "Bankruptcy Court" shall mean the United States Bankruptcy Court for the Southern District of New York.

(c) "Claims" shall mean the assertion of any right or remedy including, without limitation, all past, present and future claims, counts, cross-complaints, counterclaims, affirmative defenses, writs, demands, inquiries, requests, suits, lawsuits, rights, actions, damages, liens, contracts, policies, indemnity or defense obligations, agreements, promises, undertakings, claims for indemnity, contribution or the like, liabilities, judgments, settlements, losses, costs, expenses, administrative proceedings, directives, governmental actions or other causes of action or orders, whether known or unknown, asserted or unasserted, manifested or unmanifested, secured or unsecured, matured or unmatured, disputed or undisputed, foreseen or unforeseen, fixed or contingent, direct or indirect, whether in law, equity, bankruptcy, admiralty or otherwise, relating in any way whatsoever to bodily

injuries, death or damages of any kind or nature to a Person (including, but not limited to bodily injury, illness, wrongful death, mental anguish, emotional distress, medical monitoring, fear of bodily injury illness or death, loss of consortium (including spousal, children's or parental consortium), loss of love, society and companionship, attorneys' fees, expenses, and penalties or recompense) arising from or relating in any way to asbestos, exposure to asbestos, knowledge about asbestos or the handling, defense, trial, appeal or settlement of asbestos-related claims or the participation in the handling, defense, trial, appeal or settlement of asbestos-related claims, further including but not limited to Claims for economic damages, consequential damages and punitive damages. "Claims" shall not include Claims for damages to real property as a result of the presence of asbestos in such real property, provided that if any such Claim includes allegations that the presence of asbestos does or may cause injury to Persons in addition to real property damage, such Claim shall be included in the definition of Claim herein but only to the extent such Claim seeks damages for any such injury to such Person.

(d) "Clarifying Order" shall mean an order or orders of the Bankruptcy Court, issued pursuant to the Confirmation Order, the Insurance Settlement Order and/or Sections 105(a), 524(g), 1141 and 1142 of the Bankruptcy Code and the Court's inherent powers.

(e) "Confirmation Order" shall mean the December 22, 1986 Order of the United States Bankruptcy Court

for the Southern District of New York in *In re Johns-Manville Corp.*, 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL).

(f) "Direct Action Settlement Fund" shall mean the fund created pursuant to Paragraph 4 of this Settlement Agreement in settlement of Statutory Direct Action Claims.

(g) "Direct Action Settlement Fund Administrator" shall mean the Person selected and approved as described in Paragraph 4(c) who will administer the Direct Action Settlement Fund.

(h) "Entity" means any corporation, limited liability entity, partnership, association, trust and any other entity (including any estate, guardian or beneficiary thereof), or organization, including, without limitation, any federal, state or local government, or quasi-governmental body or political subdivision, department, agency or instrumentality thereof, or any Person.

(i) "Execution Date" shall mean the earliest date on which all the Signatories hereto have fully executed this Settlement Agreement.

(j) "Final Order" shall mean an order as to which the time to appeal, petition for certiorari, motion for reargument or rehearing has expired and as to which no appeal, petition for certiorari or other proceeding for reargument or rehearing shall be pending or as to

which any right to appeal, petition for certiorari or motion for reargument or rehearing shall have been waived in writing by the Entity possessing such right or in the event of an appeal, writ of certiorari or motion for reargument or rehearing has been sought, such order shall have been affirmed by the highest court to which such order was appealed or certiorari has been denied and the time to take any further appeal or petition for certiorari shall have expired.

(k) "Hawaii Direct Actions" shall mean the following: (i) the putative class action lawsuits captioned *Lorenzo Baclaan et al. v. Combustion Engineering, Inc. et al.*, Case No. 03-00325, United States District Court for the District of Hawaii, and *George Toro, et al. v. Combustion Engineering, Inc., et al.*, Case No. 03-00326, United States District Court for the District of Hawaii; (ii) the lawsuit captioned *Theodore K. Hopkins, et al. v. Combustion Engineering, Inc., et al.*, Case No. 03-00401, United States District Court for the District of Hawaii; and (iii) any other pending Claim against Travelers, whether under a statute or common law, arising from or relating to Travelers' alleged acts, omissions or involvement of any type in the handling, defense, trial, appeal or settlement of any Claim or the participation in the handling, defense, trial, appeal or settlement of any Claim against Combustion Engineering, Inc. (and its past, present or future parents, subsidiaries, divisions or affiliates) in Hawaii prior to the Execution Date.

(l) "Insurance Settlement Order" shall mean the December 18, 1986 Order of the United States Bankruptcy Court for the Southern District of New York entered in *In re Johns-Manville Corp.*, 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL).

(m) "Mediator" means the Honorable Mario Cuomo or such successor mediator as may be appointed by the Bankruptcy Court.

(n) "Parties" shall mean all Persons who have asserted a Statutory Direct Action Claim, Settlement Counsel, and Travelers.

(o) "Pending Statutory Direct Actions" shall mean the following putative class action lawsuits filed against Travelers: (i) each of the lawsuits consolidated under *In Re Asbestos - Unfair Trade Practices Insurance Cases*, No. 02-C-7000, Circuit Court of Kanawha County, West Virginia, and (ii) *Agnes Cashman, et al. v. Travelers Indemnity Company, et al.*, Civ. A. No. 02-2056, Superior Court of Suffolk County, Commonwealth of Massachusetts.

(p) "Person" shall mean any individual, class or group of individuals, their heirs, executors, representatives, administrators, estates, agents, successors and assigns.

(q) "Settlement Agreement" means this agreement and the exhibits thereto and shall include any amendment as provided herein.

(r) "Settlement Amount" shall mean the aggregate amount of the payment obligations set forth in Paragraph 3, as it may be reduced pursuant to Paragraph 5(b).

(s) "Settlement Counsel" shall mean the following law firms as representatives and counsel of Persons who have asserted a Statutory Direct Action Claim: (i) Motley, Rice LLC, (ii) Baron & Budd, P.C., (iii) Thornton & Naumes LLP, (iv) Law Office of Lawrence Madeksho, (v) Wilentz, Goldman & Spitzer, PA; and (vi) Galiher, DeRobertis Nakanmura Ono Takitani.

(t) "Statutory Direct Action Claims" shall mean (i) the Pending Statutory Direct Actions and (ii) all other Claims by Persons who presently hold Claims, whether asserted or unasserted, under the statutes, laws or regulations of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina, and West Virginia against Travelers arising from or relating to any acts or omissions of Travelers in (a) the handling, defense, trial, appeal or settlement or participation in the handling, defense, trial, appeal or settlement of any Claim, (b) disclosing, failing to disclose, suppressing, misleading, conspiring with any Entity to disclose or fail to disclose, suppress or mislead or acting in concert with any Entity to disclose or fail to disclose or suppress or mislead with

respect to any facts, information, knowledge or beliefs about asbestos or its hazardous properties in connection with the handling, defense, settlement or trial or participation in the handling, defense, settlement or trial of any Claim, or (c) Claims that allege unfair competition, unfair or deceptive claims handling or trade practices, lack of good faith and fair dealing, statutory-based Claims for "bad faith", actual or constructive fraud, actual or constructive breach of fiduciary duty involving, in any way, asbestos.

(u) "Travelers" shall mean: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries and sister companies (*i.e.*, Entities that are directly or indirectly owned or controlled by a common parent or holding company), as well as each of their respective predecessors, successors, assigns, officers and directors (for purposes of this section (u), all of the Entities described above are collectively referred to as "Released Parties"). "Travelers" shall also include future parents, subsidiaries and sister companies of the Released Parties (or successors of any of the foregoing), provided, however, that nothing in this Settlement Agreement shall be construed to release The St. Paul Companies or any other company first acquiring, acquired by or merging with any of the Released Parties on or after November 19, 2003 from any liability for such Entity's own conduct and not for conduct relating to or

arising from acts, omissions, conduct or issuance of insurance by the Released Parties. "Travelers" shall also include past parents, subsidiaries or sister companies of any of the Released Parties (or successors of any of the foregoing), provided however that nothing in this Settlement Agreement shall be construed to release any such past parent, subsidiary or sister company that no longer is a parent, subsidiary or sister company of any of the Released Parties as of November 19, 2003 for their own conduct after its ownership of or by or affiliation with any of the Released Parties ended and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties. By way of example, "Travelers" shall not include Aetna Inc., or any of its predecessors in interest, for its own conduct post-dating April 1996 relating to or arising from acts, omissions, conduct or issuance of insurance and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties.

2. ***Conditions Precedent***

Travelers' obligations hereunder, other than the payment set forth in Paragraph 3(b), are subject to and made expressly contingent upon the satisfaction of each of the following conditions precedent:

(a) Entry of (i) a Settlement Approval Order, and (ii) a Clarifying Order containing prohibitions against Claims at least as broad as those contained in Exhibit A, which orders shall have become a Final Order(s), and

entry of which shall have been preceded by notice of the hearing on the motion to approve this Settlement Agreement in a form and manner acceptable to the Parties and as approved by the Bankruptcy Court. Such notice shall reasonably put Persons on notice of this Settlement Agreement and be provided at least to claimants to the Manville Personal Injury Settlement Trust ("Manville Trust") who resided or filed asbestos-related bodily injury Claims in the states of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina, and West Virginia.

(b) Entry of an Order approving the settlement agreement pertaining to the Hawaii Direct Actions and enjoining: i) all members of the putative class from the prosecution of the Hawaii Direct Actions under any theory of liability pursuant to any direct action statute, or common law theory against Travelers; and ii) any related Claims for indemnification, contribution and third-party Claims, in Hawaii or under Hawaii law, against Travelers which Order shall have become a Final Order.

(c) After the entry by the Bankruptcy Court of an Order that approves the form and manner of notice and directs Settlement Counsel to communicate the terms of this settlement and other procedural matters to all potential claimants to the Direct Action Settlement Fund, no fewer than forty-nine thousand (49,000) general releases by Persons who hold Statutory Direct Action Claims in the form attached hereto as Exhibit B, as

further described in Paragraph 5 of this Settlement Agreement, shall be executed and delivered into escrow, subject to the right of the Direct Action Settlement Fund Administrator to deny any such claim that the Administrator determines is not a Qualifying Claim in accordance with the procedures attached hereto as Exhibit C. Settlement Counsel agree to use best efforts to obtain such releases by all claimants who meet the criteria for a Statutory Direct Action Claim. Upon the deposit of at least 49,000 general releases into escrow, the escrow agent shall certify to Travelers in writing that it has received at least 49,000 releases as provided by this section. This condition shall not be deemed satisfied until such certification has been received by Travelers. Travelers shall have the right to inspect such releases upon reasonable notice to the escrow agent.

3. ***Payment of Settlement Amount***

(a) Upon satisfaction of each of the conditions set forth in Paragraph 2 hereof and subject to the provisions of Paragraph 5(b) hereof, The Travelers Indemnity Company and/or Travelers Casualty & Surety Company shall pay within five (5) business days:

(1) A single payment of three hundred sixty million dollars ($360,000,000.00) to the Direct Action Settlement Fund;

and

(2) A single payment of thirty-seven million five hundred thousand dollars ($37,500,000.00) of attorneys' fees to a trust account designated by Settlement Counsel.

(b) The Travelers Indemnity Company has paid, and Settlement Counsel acknowledge that The Travelers Indemnity Company has advanced, five million dollars ($5,000,000.00) to them to fund (i) the costs associated with the formation and administration of the Direct Action Settlement Fund (including but not limited to the payment of the Administrator, of all reasonable, necessary fees and expenses in carrying out his/her duties, and of all professional and administrative personnel reasonably required to carry out his/her duties), and (ii) the costs of implementing this Settlement Agreement, including the costs of notifying claimants of this settlement, mediation, settlement master, and experts and the like but excluding attorneys' fees other than those of bankruptcy counsel retained to represent Persons holding Statutory Direct Action Claims in connection with approval of this Settlement Agreement. If the costs described in this subparagraph are less than $5,000,000.00, then the Settlement Counsel shall return the remainder to The Travelers Indemnity Company. If the costs associated with this paragraph exceed $5,000,000.00, then Travelers Indemnity Company shall provide additional advances sufficient to pay all reasonable and necessary amounts that constitute said costs.

(c) Notwithstanding anything else in this Settlement Agreement to the contrary and separate and apart from any other terms and conditions set forth herein, the non-occurrence or failure to satisfy any of the conditions precedent set forth in Paragraph 2 shall relieve Travelers from any obligation whatsoever under this Settlement Agreement, including, but not limited to, the obligation to pay any portion of the Settlement Amount with the exception of the payments described in Paragraph 3(b) above.

(d) The Settlement Amount shall be a full and final settlement. The Parties agree and jointly represent that the Settlement Amount to be paid by The Travelers Indemnity Company and/or Travelers Casualty and Surety Company pursuant to this Settlement Agreement constitutes fair and reasonable consideration. The general releases delivered hereunder are final and non-revocable (regardless of any ruling by any court) as soon as delivered into escrow as long as (i) this Settlement Agreement has been approved by a Final Order and (ii) a determination by the Direct Action Settlement Fund Administrator has been made providing the releasing party with a right to payment from the Direct Action Settlement Fund.

4. ***Direct Action Settlement Fund***

(a) Settlement Counsel shall create a Direct Action Settlement Fund into which Travelers Indemnity Company and/or Travelers Casualty and Surety Company shall make payment in accordance with and subject to the terms of this Settlement Agreement.

(b) The Direct Action Settlement Fund Administrator shall administer and pay Qualifying Claims (as that term is defined in Exhibit C) in accordance with the procedures attached hereto as Exhibit C.

(c) The Direct Action Settlement Fund shall be administered by the Direct Action Settlement Fund Administrator, who shall be a Person selected by Settlement Counsel within thirty days of the Execution Date and who shall be authorized to commence operating under this Settlement Agreement, and who thereafter shall be subject of a motion for approval by the Bankruptcy Court *nunc pro tunc.*

5. ***Releases by Claimants***

(a) Any Person who receives payment from the Direct Action Settlement Fund shall sign and deliver to Travelers a general release, in the form attached hereto as Exhibit B. To the extent applicable state law imposes any additional requirements in order to enforce in whole or in part the general releases contemplated by this Settlement Agreement, Settlement Counsel agree to take all steps necessary to obtain such general releases contemplated by this Settlement Agreement in a form that conforms with applicable state law.

(b) In the event that Travelers receives fewer than 65,000 general releases from claimants with Qualifying Claims (as that term is defined in Exhibit C) within one year of the date the Direct Action Settlement Fund

begins administering claims, Travelers shall be entitled to reimbursement from the Fund, computed as follows: (1/65,000 x $397,500,000) x N, where N = the difference between 65,000 and the actual number of general releases issued to Travelers in accordance with this Settlement Agreement. In the event that Travelers receives fewer than 70,000, but more than 65,000 general releases from claimants with Qualifying Claims (as that term is defined in Exhibit C) within one year of the date the Direct Action Settlement Fund begins administering claims, Travelers shall be entitled to reimbursement from the Fund in an amount calculated as follows: ½ x (1/70,000 x $397,500,000) x N, where N = the difference between 70,000 and the actual number of general releases issued to Travelers in accordance with this Settlement Agreement. Releases shall be provided by Persons who fall within one of the four categories of Qualifying Claims (as that term is defined in Exhibit C) and thus Claims that are derived in whole or in part from such Qualifying Claims including but not limited to claims for loss of consortium (including spousal, children's or parental consortium) shall not be included in calculating the numbers of releases required by this section.

6. ***Stays and Dismissals With Prejudice of Lawsuits***

(a) Upon execution of this Settlement Agreement, Settlement Counsel on behalf of all plaintiffs and putative class members agree to continue to stay the Pending Statutory Direct Action Claims as against Travelers pending a Final Order approving this Settlement Agreement.

(b) Upon the Settlement Approval and Clarifying Order containing prohibitions against Claims at least as broad as those contained in Exhibit A becoming a Final Order, all named plaintiffs shall promptly dismiss with prejudice as against Travelers the Pending Statutory Direct Actions.

7. ***Attorneys' Fees***

The Parties understand and agree that the Direct Action Settlement Fund is an entity that shall be independent of the Manville Trust, and that compensation for legal services for claims made against the Direct Action Settlement Fund as between a claimant and his or her counsel will be subject to the contracts for legal services between a claimant and his or her counsel, and that the Order approving this Settlement will specify that any prior Order in this case pertaining to compensation for legal services for claims made against the Manville Trust will not apply to claims against the Direct Action Settlement Fund. Travelers further agrees that it will not challenge any of said individual contracts for legal services on any basis whatsoever.

8. ***Not Evidentiary and Not an Admission***

The Parties agree that no part of this Settlement Agreement may be used in any proceeding as evidence of their respective rights, duties or obligations; provided, however, that this restriction shall not apply to any proceeding in connection with or related to the

interpretation, validity, enforcement or breach of this Settlement Agreement. This Settlement Agreement is not intended to be nor shall it be construed as an admission of liability by Travelers and should not be construed to be a concession or admission that the Statutory Direct Actions have any factual or legal merit or that the Statutory Direct Action Claims are not in any way subject to the Manville Confirmation Order or the Manville insurance Settlement Order. Travelers expressly states that the Statutory Direct Action Claims lack legal and factual merit and are barred by the Manville Confirmation Order and the Manville Settlement Order. This Settlement Agreement is nevertheless made in settlement of disputed Claims and this Settlement Agreement shall not be used in any court or dispute resolution proceeding to create, prove or interpret any rights or obligations of Travelers. Without limiting the foregoing, this Settlement Agreement shall be deemed to fall within the protection afforded compromises and offers to compromise by Rule 408 of the Federal Rules of Evidence and corresponding state rules.

9. ***Confidentiality***

The Parties agree that, except by order of court of competent jurisdiction and upon notice to all Parties, all communications (written or oral) in connection with the settlement discussions leading to this Settlement Agreement or with respect to any of the draft terms or conditions of this Settlement Agreement shall remain confidential, and that the Parties may not seek discovery

into, or seek to introduce at any trial or proceeding, pending and future, evidence of such communications.

10. *Successors*

This Settlement Agreement shall not be construed to inure to the benefit of any Entity other than Travelers.

11. *Amendments*

No amendments or variations of the terms of this Settlement Agreement shall be valid unless made in writing and signed by Settlement Counsel and Travelers and approved by the Bankruptcy Court.

12. *Execution*

This Settlement Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. A facsimile or telecopy of a Party's signature hereto shall be as valid, binding, and enforceable as the original thereof.

13. *Representation of Authority*

The individuals signing this Settlement Agreement hereby represent to each other, the Mediator and the Bankruptcy Court that they are authorized to enter into this Settlement Agreement on behalf of all Persons whom they purport to represent and to bind their principals to this Settlement Agreement.

Appendix D

14. *Construction*

This Settlement Agreement is not a contract of insurance and the Parties agree that any special rules of interpretation or construction of insurance contracts shall not apply. This Settlement Agreement is the product of arm's length negotiations between and among the Parties and counsel in a mediation ordered by the Bankruptcy Court under the auspices of the Honorable Mario Cuomo. Each of the Parties hereto has participated in the drafting of this Settlement Agreement. Therefore, it is the intent of the Parties that no part of this Settlement Agreement shall be construed against any other Party because of the identity of the drafter or because Travelers is an insurance company.

15. *Headings*

Paragraph headings contained herein are for purposes of organization only and shall not constitute a part of the terms of this Settlement Agreement.

16. *Entire Agreement*

This Settlement Agreement is an integrated agreement containing the entire understanding among the Parties regarding the matters expressly addressed herein and, except as set forth in this Settlement Agreement, no representations, warranties or promises have been made or relied upon by the Parties to this Settlement Agreement. This Settlement Agreement shall prevail over prior communications and agreements between the parties or their representatives.

Appendix D

17. *Use of Singular and Plural*

For the purposes of this Agreement, unless the context otherwise requires, words in the singular include words in the plural and vice versa.

18. *Governing Law and Continuing Jurisdiction*

Except to the extent governed by the Bankruptcy Code and interpreted in accordance therewith, this Settlement Agreement shall be governed by and construed in accordance with the laws of the State of New York. The United States Bankruptcy Court for the Southern District of New York shall have continuing and exclusive jurisdiction over this Settlement Agreement and the Parties in respect of their relations hereunder.

19. *Best Efforts*

All Parties will use their best efforts to obtain the outcomes sought by this Settlement Agreement, which shall include joint motion by Travelers and the Settlement Counsel to obtain, a Final Order approving this Settlement Agreement and entry of the Settlement Approval and Clarifying Order containing prohibitions against Claims at least as broad as those contained in Exhibit A, provided, however, that nothing contained herein shall be construed to require, and the parties agree, that Travelers shall not be required, to disclose the identity of any of its policyholders to any Person, including but not limited to Settlement Counsel or the Direct Action Settlement Fund Administrator or the arbitrator.

Appendix D

20. *Correspondence*

Each of the Parties shall be provided with notice of any dispute concerning this Settlement Agreement or its interpretation or effect. Any such notice or communications shall be addressed and sent in writing, by registered or certified mail, return receipt requested, to the attention of the persons identified below (or as the Parties may subsequently direct in writing):

(1) If to Settlement Counsel to:

Motley, Rice LLC
28 Bridgeside Blvd.
P.O. Box 1792
Mt. Pleasant, S.C. 29465
Attn: Joseph F. Rice, Esq.

and to

Baron & Budd, P.C.
3102 Oak Lawn Avenue,
Suite 1100
Dallas, TX 75219
Attn: Alan B. Rich, Esq.

and to

Thornton & Naumes LLP
100 Summer Street, 3rd Floor
Boston, MA 02110
Attn: Michael P. Thornton, Esq.

and to

Law Office of Lawrence
Madeksho
8866 Gulf Freeway, Suite 440
Houston, TX 77017
Attn: Lawrence Madeksho, Esq.

and to

Wilentz, Goldman & Spitzer, PA
90 Woodbridge Center Drive
Woodbridge, NJ 07095
Attn: Christopher M. Placitella, Esq.

and to

Galiher, DeRobertis Nakamura Ono Takitani
610 Ward Avenue, Suite 200
Honolulu, HI 96814-3308
Attn: Gary O. Galiher, Esq.

(2) If to Travelers:

General Counsel – Environmental
Litigation Group
Travelers Indemnity Company
One Tower Square
Hartford, CT 06183-6016

Appendix D

(3) If to the Direct Action Settlement Fund Administrator:

To be provided upon appointment.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, affix their signatures hereto and direct Travelers counsel to deposit a copy thereof with the Mediator, whereupon it shall become effective:

THE TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY AND TRAVELERS PROPERTY CASUALTY CORP.

By: /s/ Witness: /s/

Name:

Title:

Date:

SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Joseph F. Rice, Esquire of Motley, Rice LLC

Date:

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SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Alan Rich, Esquire of Baron & Budd, P.C.

Date:

SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Michael P. Thornton, Esquire of Thornton & Naumes LLP

Date:

SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Lawrence Madeksho, Esquire of Law Offices of Lawrence Madeksho

Date:

SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Christopher M. Placitella, Esq., Esquire of Wilentz, Goldman & Spitzer, PA

Date:

Appendix D

SETTLEMENT COUNSEL

By: /s/ Witness: /s/

Name: Gary Galiher, Esquire of Galiher, DeRobertis Nakamura Ono Takitani

Date:

APPENDIX E — COMMON LAW DIRECT ACTION SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT, dated as of May 21, 2004 (as defined herein), as amended May 25, 2004, made and entered into by and between (1) the Settlement Counsel (as defined herein) on behalf of all Persons (as defined herein) identified on Exhibit C who have or may assert Common Law Direct Action Claims (as defined herein) and (ii) The Travelers Indemnity Company and Travelers Casualty and Surety Company (formerly known as The Aetna Casualty and Surety Company):

WHEREAS, Travelers Indemnity Company and Travelers Casualty and Surety Company (and others) have been named defendants in certain lawsuits brought by Persons who assert they were injured allegedly by exposure to asbestos and have been threatened with other similar lawsuits;

WHEREAS, plaintiffs in the Pending Direct Actions (as defined herein) have filed certain actions against Travelers based on Travelers alleged failure to warn, conspiracy, concert of action, negligent undertaking, spoliation and other Claims associated with Travelers alleged knowledge of the hazards of asbestos;

WHEREAS, Travelers contests the allegations of the Pending Direct Actions and the validity of such lawsuits and any liability thereunder;

Appendix E

WHEREAS, Travelers believes that all direct action claims, including but not limited to the Common Law Direct Action Claims, whether sounding in tort or contract or brought pursuant to statute, are barred by the Confirmation Order and Insurance Settlement Order (as defined herein) entered by the Bankruptcy Court in *In re Johns-Manville Corp.*;

WHEREAS, the Parties (as defined herein) now deem it to be in their best interests to settle and fully and finally to compromise in accordance with the terms of this Settlement Agreement all disputes, issues and objections that now exist or might exist in the future between and among them concerning the Common Law Direct Action Claims;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the sufficiency of which is hereby acknowledged, THE PARTIES AGREE AS FOLLOWS:

1. ***Definition***

(a) "Bankruptcy Code" shall mean Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended from time to time.

(b) "Bankruptcy Court" shall mean the United States Bankruptcy Court for the Southern District of New York.

Appendix E

(c) "Claims" shall mean the assertion of any right or remedy including, without limitation, all past, present and future claims, counts, cross-complaints, counterclaims, affirmative defenses, writs, demands, inquiries, requests, suits, lawsuits, rights, actions, damages, liens, contracts, policies, indemnity or defense obligations, agreements, promises, undertakings, claims for indemnity, contribution or the like, liabilities, judgments, settlements, losses, costs, expenses, administrative proceedings, directives, governmental actions or other causes of action or orders, whether known or unknown, asserted or unasserted, manifested or unmanifested, secured or unsecured, matured or unmatured, disputed or undisputed, foreseen or unforeseen, fixed or contingent, direct or indirect, whether in law, equity, bankruptcy, admiralty or otherwise, relating in any way whatsoever to bodily injuries, death or damages of any kind or nature to a Person (including, but not limited to bodily injury, illness, wrongful death, mental anguish, emotional distress, medical monitoring, fear of bodily injury illness or death, loss of consortium (including spousal, children's or parental consortium), loss of love, society and companionship, attorneys' fees, expenses, and penalties or recompense) arising from or relating in any way to asbestos, exposure to asbestos, knowledge about asbestos or the handling, defense, trial, appeal or settlement of asbestos-related claims or the participation in the handling, defense, trial, appeal or settlement of asbestos-related claims, further including but not limited to Claims for economic damages, consequential damages and punitive damages.

(d) "Confirmation Order" shall mean the December 22, 1986 Order of the United States Bankruptcy Court for the Southern District of New York in *In re Johns-Manville Corp.*, 82 B 11656, 82B 11657, 82B 11660, 82 B 11661, 82 B 11665 through 82B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL).

(e) "Common Law Direct Action Claims" shall mean (i) the Claims by Persons listed on Exhibit C hereto and (ii) all other Claims by Persons, who have or who otherwise could assert Claims under the common law, statutes, laws or regulations of the United States or any state or territory thereof, against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Johns Manville and its affiliates ("Manville") or Travelers knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices; bad faith; failure to warn, conspiracy, concert of action, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, spoliation of evidence, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law; *provided, however* that Common Law Direct Action Claims shall not include Claims against Travelers by policyholders other than Manville (or assignees of such policyholders) for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than

Manville; and provided further that Common Law Direct Action Claims shall exclude Statutory Direct Action Claims as that term is defined in the Statutory Direct Action Settlement Agreement dated March 8, 2004, as amended March 26, 2004.

(f) "Common Law Direct Action Settlement Fund" shall mean the fund created pursuant to Paragraph 4 of this Settlement Agreement in settlement of Common Law Direct Action Claims.

(g) "Common Law Direct Action Settlement Fund Administrator" shall mean the Person mutually agreed upon by the Parties pursuant to Paragraph 4(c) who will administer the Common Law Direct Action Settlement Fend.

(h) "Entity" means any corporation, limited liability entity, partnership, association, trust and any other entity (including any estate, guardian or beneficiary thereof), or organization, including, without limitation, any federal, state or local government, or quasi-governmental body or political subdivision, department, agency or instrumentality thereof, or any Person.

(i) "Execution Date" shall mean first date on which all the Signatories hereto have fully executed this Settlement Agreement

(j) "Final Order" shall mean an order as to which the time to appeal, petition for certiorari, motion for reargument or rehearing has expired and as to which

no appeal, petition for certiorari or other proceeding for reargument or rehearing shall be pending or as to which any right to appeal, petition for certiorari or motion for argument or rehearing shall have been waived in writing by the Entity possessing such right or in the event of an appeal, writ of certiorari or motion for reargument or rehearing has been sought, such order shall have been affirmed by the highest court to which such order was appealed or certiorari has been denied and the time to take any further appeal or petition for certiorari shall have expired.

(k) "Insurance Settlement Order" shall mean the December 18, 1986 Order of the United States Bankruptcy Court for the Southern District of New York entered in *In re Johns-Manville Corp.*, 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL).

(l) "Mediator" means the Honorable Mario M. Cuomo.

(m) "Parties" shall mean all Persons identified on Exhibit C, Settlement Counsel, and Travelers.

(n) "Pending Common Law Direct Actions" shall mean, the lawsuits and any similar suit filed against Travelers by Persons listed on Exhibit C.

(o) "Person" shall mean any individual or group of individuals, their heirs, executors, representatives, administrators, estates, agents, successors and assigns.

(p) "Settlement Agreement" means this agreement and shall include any amendment as provided herein and the exhibits hereto.

(q) "Settlement Amount" shall mean the aggregate amount of the payment obligations set forth in Paragraph 3, as it may be reduced pursuant to Paragraph 5(b).

(r) "Settlement Counsel" shall mean (i) Law Offices of Lawrence Madeksho LLC; (ii) Law Offices of Bruce Carter (iii) Bevan & Associates LPA Inc.; and (iv) The Bogdan Law Firm as representatives and counsel of Persons listed on Exhibit C.

(s) "Travelers" shall mean: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries and sister companies (*i.e.*, Entities that are directly or indirectly owned or controlled by a common parent or holding company), as well as each of their respective predecessors, successors, assigns, officers and directors (for purposes of this section (t), all of the Entities described above are collectively referred to as "Released Parties"). "Travelers" shall also include future parents, subsidiaries and sister companies of the Released Parties (or successors of any of the foregoing), provided, however, that nothing in this Settlement Agreement shall be construed to release The St. Paul

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Companies (as constituted prior to April 1, 2004) or any company first acquiring, acquired by or merging with any of the Released Parties on or after the Execution Date from any liability for such Entity's own conduct and not for conduct relating to or arising from acts, omissions, conduct or issuance of insurance by the Released Parties. "Travelers" shall also include past parents, subsidiaries or sister companies of any of the Released Parties (or successors of any of the foregoing), provided however that nothing in this Settlement Agreement shall be construed to release any such past parent, subsidiary or sister company that no longer is a parent, subsidiary or sister company of any of the Released Parties as of the Execution Date for their own conduct after its ownership of or by or affiliation with any of the Released Parties ended and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties. By way of example, "Travelers" shall not include Aetna Inc., or any of its predecessors in interest, for its own conduct post-dating April 1996 relating to or arising from acts, omissions, conduct or issuance of insurance and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties.

2. ***Conditions Precedent***

Travelers' obligations hereunder, other than the payment set forth in Paragraph 3(b), are subject to and made expressly contingent upon the satisfaction of each of the following conditions precedent:

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(a) Entry of an order or orders of the Bankruptcy Court, issued pursuant to the Confirmation Order, the Insurance Settlement Order and/or Sections 105(a), 524(g), 1141 and 1142 of the Bankruptcy Code and the Court's inherent powers, substantially in the form attached hereto as Exhibit A, upon notice procedures reasonably satisfactory to Travelers, which order shall have become a Final Order.

(b) Entry of an Order approving this Settlement Agreement, which Order shall have become a Final Order, with notice of the hearing on the motion to approve this Settlement Agreement and the Order described in Section 2(a) above, in a form and manner acceptable to Travelers and as approved by the Bankruptcy Court.

(c) Execution and delivery into escrow, within sixty (60) days of approval by the Bankruptcy Court of this Settlement Agreement, of no fewer than fourteen thousand (14,000) general releases, substantially in the form attached hereto as Exhibit B, as further described in Paragraph 5 of this Settlement Agreement.

3. ***Payment of Settlement Amount***

(a) Upon satisfaction of each of the conditions set forth in Paragraph 2 hereof and subject to the provisions of Paragraph 5(b) hereof, Travelers Indemnity Company shall pay within 30 days:

(1) Seventy million dollars ($70,000,000) to the Common Law Direct Action Settlement Fund; and

(2) Twenty million dollars ($20,000,000) of attorneys' fees to be paid as follows:

(b) The Travelers Indemnity Company shall pay the costs associated with the formation of the Common Law Direct Action Settlement Fund (including but not limited to the payment of the Administrator, of all reasonable, necessary fees and expenses in carrying out his/her duties, and of all professional and administrative personnel reasonably required to carry out his/her duties) subject to a cap of four million dollars ($4,000,000).

(c) Notwithstanding anything else in this Settlement Agreement to the contrary and separate and apart from any other terms and conditions set forth herein, the non-occurrence or failure to satisfy any of the conditions precedent set forth in Paragraph 2 shall relieve Travelers from any obligation whatsoever under this Settlement Agreement, including, but not limited to, the obligation to pay any portion of the Settlement Amount with the exception of the payments described in Paragraph 3(b) above.

(d) The Settlement Amount shall be a full and final settlement. The Parties agree and jointly represent that the Settlement Amount to be paid by The Travelers Indemnity Company and/or Travelers Casualty and

Surety Company pursuant to this Settlement Agreement constitutes fair and reasonable consideration. The general releases delivered hereunder are final and non-revocable regardless of any ruling by any court after this Settlement Agreement has been approved by a Final Order.

4. ***Common Law Direct Action Settlement Fund***

(a) Settlement Counsel shall create a Common Law Direct Action Settlement Fund into which The Travelers Indemnity Company and/or Travelers Casualty and Surety Company shall make payment in accordance with and subject to the terms of this Settlement Agreement.

(b) The Common Law Direct Action Settlement Fund Administrator shall administer and pay Qualifying Claims in accordance with the procedures to be approved by the Court.

(c) The Common Law Direct Action Settlement Fund shall be administered by the Common Law Direct Action Settlement Fund Administrator, who shall be a Person mutually agreed upon by the Parties and approved by the Bankruptcy Court.

5. ***Releases by Claimants***

Any Person who receives payment from the Common Law Direct Action Settlement Fund shall sign and deliver to Travelers a general release, in substantially the form attached hereto as Exhibit B. To the extent applicable

state law imposes any additional requirements in order to enforce in whole or in part the general releases contemplated by this Settlement Agreement, Settlement Counsel agree to take all steps necessary to obtain such general releases contemplated by this Settlement Agreement in a form that conforms with applicable state law.

6. ***Stays and Dismissals With Prejudice of Lawsuits***

(a) Upon execution of this Settlement Agreement, Settlement Counsel on behalf of all plaintiffs identified on Exhibit C agree to continue to stay the Pending Common Law Direct Action Claims as against Travelers pending a Final Order approving this Settlement Agreement.

(b) Upon the Order approving this Settlement Agreement becoming a Final Order and the order described in Section 2(a) containing prohibitions against Claims at least as broad as those contained in Exhibit A becoming a Final Order, plaintiffs shall promptly dismiss with prejudice as against Travelers the Pending Common Law Direct Actions.

7. ***Attorneys' Fee***

Travelers agrees not to challenge the individual contingency fee arrangements of any Settlement Counsel who is a signatory to this Settlement Agreement.

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8. ***Not Evidentiary and Not an Admission***

The Parties agree that no part of this Settlement Agreement may be used in any proceeding as evidence of their respective rights, duties or obligations; provided, however, that this restriction shall not apply to any proceeding in connection with or related to the interpretation, validity, enforcement or breach of this Settlement Agreement. This Settlement Agreement is not intended to be nor shall it be construed as an admission of liability by Travelers and should not be construed to be a concession or admission that the Direct Actions have any factual or legal merit or that the Common Law Direct Action Claims are not in any way subject to the Manville Confirmation Order or the Manville Insurance Settlement Order. Travelers expressly states that the Common Law Direct Action Claims lack legal and factual merit and are barred by the Manville Confirmation Order and the Manville Settlement Order. This Settlement Agreement is nevertheless made in settlement of disputed claims and this Settlement Agreement shall not be used in any court or dispute resolution proceeding to create, prove or interpret any rights or obligations of Travelers. Without limiting the foregoing, this Settlement Agreement shall be deemed to fall within the protection afforded compromises and offers to compromise by Rule 408 of the Federal Rules of Evidence and corresponding state rules.

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9. *Confidentiality*

The Parties agree that, except by order of court of competent jurisdiction and upon notice to all Parties, all communications (written or oral) in connection with the settlement discussions leading to this Settlement Agreement or with respect to any of the draft terms or conditions of this Settlement Agreement shall remain confidential, and that the Parties may not seek discovery into, or seek to introduce at any trial or proceeding, pending and future, evidence of such communications.

10. *Successors*

This Settlement Agreement shall not be construed to inure to the benefit of any Entity other than Travelers.

11. *Amendments*

No amendments or variations of the terms of this Settlement Agreement shall be valid unless made in writing and signed by the Settlement Counsel and Travelers and approved by the Bankruptcy Court.

12. *Execution*

This Settlement Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. A facsimile or telecopy of a Party's signature hereto shall be as valid, binding, and enforceable as the original thereof.

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13. *Representation of Authority*

The individuals signing this Settlement Agreement hereby represent to each other, the Mediator and the Bankruptcy Court that they are authorized to enter into this Settlement Agreement on behalf of all Persons whom they purport to represent and to bind their principals to this Settlement Agreement.

14. *Construction*

This Settlement Agreement is not a contract of insurance and the Parties agree that any special rules of interpretation or construction of insurance contracts shall not apply. This Settlement Agreement is the product of arm's length negotiations between and among the Parties and counsel in a mediation ordered by the Bankruptcy Court under the auspices of the Honorable Mario M. Cuomo. Each of the Parties hereto has participated in the drafting of this Settlement Agreement. Therefore, it is the intent of the Parties that no part of this Settlement Agreement shall be presumptively construed against any other Party because of the identity of the drafter or because Travelers is an insurance company.

15. *Headings*

Paragraph headings contained herein are for purposes of organization only and shall not constitute a part of the terms of this Settlement Agreement.

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16. *Entire Agreement*

This Settlement Agreement is an integrated agreement containing the entire understanding among the Parties regarding the matters expressly addressed herein and, except as set forth in this Settlement Agreement, no representations, warranties or promises have been made or relied upon by the Parties to this Settlement Agreement. This Settlement Agreement shall prevail over prior communications and agreements between the Parties or their representatives.

17. *Use of Singular and Plural*

For the purposes of this Agreement, unless the context otherwise requires, words in the singular include words in the plural and vice versa.

18. *Governing Law and Continuing Jurisdiction*

Except to the extent governed by the Bankruptcy Code and interpreted in accordance therewith, this Settlement Agreement shall be governed by and construed in accordance with the laws of the State of New York, The United States Bankruptcy Court for the Southern District of New York shall have continuing and exclusive jurisdiction over this Settlement Agreement and the Parties in respect of their relations hereunder.

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19. *Best Efforts*

All Parties will use their best efforts to obtain the outcomes sought by this Settlement Agreement, which shall include joint motion by Travelers and the Settlement Counsel to obtain, upon an evidentiary hearing, a Final Order approving this Settlement Agreement and entry of the order described in Section 2(a) containing prohibitions against Claims at least as broad as those contained in Exhibit A.

20. *Correspondence*

Each of the Parties shall be provided with notice of any dispute concerning this Settlement Agreement or its interpretation or effect. Any such notice or communications shall be addressed and sent in writing, by registered or certified mail, return receipt requested, to the attention of the persons identified below (or as the Parties may subsequently direct in writing):

(1) If to Settlement Counsel to:

Lawrence Madeksho, Esq.
THE MADEKSHO LAW FIRM PLLC
8866 Gulf Freeway, Suite 440
Houston, TX 77017
Facsimile: (713) 910-0250
Counsel For Texas Plaintiffs

and to

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Eric Bogdan, Esq.
THE BOGDAN LAW FIRM 8866
Gulf Freeway, Suits 515
Houston, TX 77017
Facsimile: (713) 378-9379
Counsel For Texas Plaintiffs

Bruce Carter, Esq.
LAW OFFICE OF BRUCE CARTER
5458 Yosemite Dr.
Fairfield, Ohio 45014
Facsimile: (513) 829-4579
Counsel For Ohio Plaintiffs

Thomas W. Bevan, Esq.
BEVAN & ASSOCIATES, LPA
10360 Northfield Road
Northfield, Ohio 44067
Facsimile: (330) 467-4493

(2) If to Travelers:

General Counsel - Environmental
Litigation Group
Travelers Indemnity Company
One Tower Square
Hartford, CT 06183-6016

(3) If to the Common Law Direct Action Settlement Fund Administrator:

To be provided upon appointment.

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21. *Representation Concerning Clients*

Settlement Counsel represent only the clients listed on Exhibit C hereto. This Settlement Agreement shall not be construed as an undertaking or representation on behalf of anyone not identified on Exhibit C. Settlement Counsel agree to include in Exhibit C all existing clients of Settlement Counsel with pending or potential Common Law Direct Action Claims as well as existing clients of the following firms: (i) Law Offices of R. Bryan Nace; (ii) Richarson, Patrick, Westbrook & Brickman, LLC; (iii) Martin & Jones; (iv) The Lanier Law Firm and (v) The Simmons Firm LLC, with pending or potential Common Law Direct Action Claims.

22. *Counterparts*

This Agreement maybe signed in counterparts, each of which shall be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, affix their signatures hereto and direct Travelers counsel to deposit a copy thereof with the Mediator, whereupon it shall become effective:

THE TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY AND TRAVELERS PROPERTY CASUALTY CORP.

By: s/ Timothy H. Yessman
Name: Timothy H. Yessman
Title: Executive Vice-President

Witness: s/ [illegible]

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CLAIMANTS' REPRESENTATIVE

By: s/ Lawrence Madeksho
Name: Lawrence Madeksho
Date: 5-25-04

Witness: s/ [Eric Bogdan]

CLAIMANTS' REPRESENTATIVE

By: s/ Eric Bogdan
Name: Eric Bogdan
Date: May 25, 2004

Witness: s/ [illegible]

CLAIMANTS' REPRESENTATIVE

By: s/ Bruce Carter
Name: Bruce Carter
Date: May 25, 2004

Witness: s/ [Eric Bogdan]

CLAIMANTS' REPRESENTATIVE

By:
Name:
Date:

Witness:

CLAIMANTS' REPRESENTATIVE

By:
Name:
Date:

Witness:

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CLAIMANTS' REPRESENTATIVE

By: Witness:
Name:
Date:

CLAIMANTS' REPRESENTATIVE

By: s/ Thomas W. Bevan Witness: s/ [illegible]
Name: Thomas W. Bevan
for Bevan & Associates, LPA, Inc.
Date: May 25, 2004

CLAIMANTS' REPRESENTATIVE

By: Witness:
Name:
Date:

APPENDIX F — HAWAII DIRECT ACTION SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT (as defined herein), dated as of May 21, 2004, made and entered into by and between (i) the Hawaii Direct Action Settlement Counsel (as defined herein) on behalf of all Persons (as defined herein) who have asserted Hawaii Direct Action Claims (as defined herein); and (ii) The Travelers Indemnity Company and Travelers Casualty and Surety Company (formerly known as The Aetna Casualty and Surety Company):

WHEREAS, Travelers (as defined herein) contests the allegations of the Hawaii Direct Action Claims and the validity of the threatened lawsuits and any liability thereunder;

WHEREAS, the Parties (as defined herein) now deem it to be in their best interests to settle and fully and finally compromise in accordance with the terms of this Settlement Agreement all disputes, issues and objections that now exist or might exist in the future between and among them concerning the Hawaii Direct Action Claims;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the sufficiency of which is hereby acknowledged, THE PARTIES AGREE AS FOLLOWS:

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1. *Definitions*

(a) "Bankruptcy Code" shall mean Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq, as amended from time to time.

(b) "Bankruptcy Court" shall mean the United States Bankruptcy Court for the Southern District of New York.

(c) "Claims" shall mean the assertion of any right or remedy including, without limitation, all past, present and future claims, counts, cross-complaints, counterclaims, affirmative defenses, writs, demands, inquiries, requests, suits, lawsuits, rights, actions, damages, liens, contracts, policies, indemnity or defense obligations, agreements, promises, undertakings, claims for indemnity, contribution or the like, liabilities, judgments, settlements, losses, costs, expenses, administrative proceedings, directives, governmental actions or other causes of action or orders, whether known or unknown, asserted or unasserted, manifested or unmanifested, secured or unsecured, matured or unmatured, disputed or undisputed, foreseen or unforeseen, fixed or contingent, direct or indirect, whether in law, equity, bankruptcy, admiralty or otherwise, relating in any way whatsoever to bodily injuries, death or damages of any kind or nature to a Person (including, but not limited to bodily injury, illness, wrongful death, mental anguish, emotional distress, medical monitoring, fear of bodily injury illness or death, less of consortium (including spousal,

children's or parental consortium), loss of love, society and companionship, attorneys' fees, expenses, and penalties or recompense) arising from or relating in any way to asbestos, exposure to asbestos, knowledge about asbestos or the handling, defense, trial, appeal or settlement of asbestos-related claim the participation in the handling, defense, trial, appeal or settlement of asbestos-related claims or the participation in the handling, defense, trial, appeal or settlement of asbestos-related claims, further including but not limited to claims for economic damages, consequential damages and punitive damages. "Claims" shall not include claims for damages to real property as a result of the presence of asbestos in such real property, provided that if any such claim includes allegations that the presence of asbestos does or may cease injury to Persons in addition to real property damage, such claim shall be included in the definition of Claim herein but only to the extent such claim seeks damages for any such injury to such Person.

(d) "Confirmation Order" shall mean the December 22, 1986 Order of the United States Bankruptcy Court for the Southern District of New York in *In re Johns-Manville Corp.*, 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL).

(e) "Entity" means any corporation, limited liability entity, partnership, association, trust and any other entity (including any estate, guardian or beneficiary thereof), or organization, including, without

limitation, any federal, state or local government, or quasi-governmental body or political subdivision, department, agency or instrumentality thereof, or any Person.

(f) "Execution Date" shall mean the earliest date on which all the Signatories hereto have fully executed this Hawaii Settlement Agreement.

(g) "Final Order" shall mean an order as to which the time to appeal, petition for certiorari, motion for reargument or rehearing has expired and as to which no appeal, petition for certiorari or other proceeding for reargument or rehearing shall be pending or as to which any right to appeal, petition for certiorari or motion for reargument or rehearing shall have been waived in writing by the Entity possessing such right or in the event of an appeal, writ of certiorari or motion for reargument or rehearing has been sought, such order shall have been affirmed by the highest court to which such order was appealed or certiorari has been denied and the time to take any further appeal or petition for certiorari shall have expired.

(h) "Hawaii Direct Action Claims" shall mean the following: (i) the putative class action lawsuits captioned *Lorenzo Baclaan, et al. v. Combustion Engineering Inc., et al.*, Case No. 03-00325, United States District Court for the District of Hawaii, and *George Toro, et al. v. Combustion Engineering, Inc., et al.*, Case No. 03-00326, United States District Court for the District of Hawaii; (ii) the lawsuit captioned *Theodore K. Hopkins,*

et al. v. Combustion Engineering, Inc., et al., Case No. 03-00401, United States District Court for the District of Hawaii; and (iii) any other Claim against Travelers, whether under a statute, common law or otherwise, asserted or unasserted, arising from or relating to Travelers' alleged acts, omissions or involvement of any type in the handling, defense, trial, appeal or settlement of any Claim by any Person against Combustion Engineering, Inc. (and its past, present or future parents, subsidiaries, divisions or affiliates) ("Combustion Engineering") filed in any state or federal Hawaiian court and resolved prior to the Execution Date.

(i) "Hawaii Direct Action Settlement Counsel" shall mean Gary O. Galiher, Esq., and Galiher, DeRobertis Nakamura Ono Takitani, the law firm serving as representative and counsel of Persons who have asserted a Hawaii Direct Action Claim.

(j) "Hawaii Direct Action Settlement Fund" shall mean the fund created pursuant to Paragraph 4 of this Hawaii Settlement Agreement in settlement of Hawaii Direct Action Claims.

(k) "Hawaii Direct Action Settlement Fund Administrator" shall mean the Person selected and approved as described in Paragraph 4(c) who will administer the Hawaii Direct Action Settlement Fund.

(l) "Hawaii Settlement Agreement" means this agreement and the exhibits thereto and shall include any amendment as provided herein.

(m) "Insurance Settlement Order" shall mean the December 18, 1986 Order of the United States Bankruptcy Court for the Southern District of New York entered in *In re Johns-Manville Corp.*, 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82 B 114573 inclusive, 82 B 11675, 82 B 11676 (BRL).

(n) "Mediator" means the Honorable Mario Cuomo or such successor mediator as maybe appointed by the Bankruptcy Court.

(o) "Parties" shall mean all Persons who have asserted a Hawaii Direct Action Claim, Hawaii Direct Action Settlement Counsel, and Travelers.

(p) "Person" shall mean any individual, class or group of individuals, their heirs, executors, representatives, administrators, estates, agents, successors and assigns.

(q) "Settlement Amount" shall mean the aggregate amount of the payment obligations set forth in Paragraph 3, as it may be reduced pursuant to Paragraph 5(b).

(r) "Settlement Approval and Clarifying Order" shall mean an order or orders of the Bankruptcy Court, issued pursuant to the Confirmation Order, the Insurance Settlement Order and/or Sections 105(a), 524(g), 1141 and 1142 of the Bankruptcy Code and the Court's inherent powers.

(s) "Statutory Direct Action Claims" shall have the definition provided in the Statutory Direct Action Settlement Agreement.

(t) "Statutory Direct Action Settlement Agreement" means the agreement executed on March 8, 2004 and as amended March 24, 2004 between counsel to Persons asserting Statutory Direct Action Claims and Travelers.

(u) "Travelers" shall mean: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect, parents, subsidiaries and sister companies (*i.e.*, Entities that are directly or indirectly owned or controlled by a common parent or holding company), as well as each of their respective predecessors, successors, assigns, officers and directors (for purposes of this section (u), all of the Entities described above are collectively referred to as "Released Parties"). "Travelers" shall also include future parents, subsidiaries and sister companies of the Released Parties (or successors of any of the foregoing). Notwithstanding the above, nothing in this Hawaii Settlement Agreement shall be construed to release St. Paul Travelers Companies, Inc. in its capacity as successor to The St. Paul Companies, or any other company first acquiring, acquired by or merging with any of the Released Parties on or after November 19, 2003 from any liability for such Entity's own conduct

and not for conduct relating to or arising from acts, omissions, conduct or issuance of insurance by the Released Parties. "Travelers" shall also include past parents, subsidiaries or sister companies of any of the Released Parties (or successors of any of the foregoing), provided however that nothing in this Hawaii Settlement Agreement shall be construed to release any such past parent, subsidiary or sister company that no longer is a parent, subsidiary or sister company of any of the Released Parties as of November 19, 2003 for its own conduct after its ownership of or by or affiliation with any of the Released Parties ended and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties. By way of example, "Travelers" shall not include Aetna Inc., or any of its predecessors in interest, for its own conduct post-dating April 1996 relating to or arising front acts, omissions, conduct or issuance of insurance and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Released Parties.

2. ***Conditions Precedent***

Travelers' obligations hereunder are subject to and made expressly contingent upon the satisfaction of each of the following conditions precedent. Notwithstanding anything else in this Hawaii Settlement Agreement to the contrary and separate and apart from any other terms and conditions set forth herein, the non-occurrence or failure to satisfy any of the conditions precedent set forth in this Paragraph 2 shall relieve Travelers from any obligation whatsoever under this

Hawaii Settlement Agreement, including, but not limited to, the obligation to pay any portion of the Settlement Amount.

(a) Entry of an order or orders, which order or orders each shall have become a Final Offer, approving this Hawaii Settlement Agreement and enjoining all Hawaii Direct Action Claims against Travelers, and the entry of which shall have been preceded by notice of the hearing on the motion to approve this Hawaii Settlement Agreement in a form and manner acceptable to the Parties and as approved by the Bankruptcy Court. Such notice, which may include publication notice, shall reasonably put Persons on notice of this Hawaii Settlement Agreement and be provided at least to claimants who, according to the records of Connecticut Valley Claim Services, filed and/or resolved claims against Combustion Engineering prior to the Execution Date which claims were asserted in any state or federal court in Hawaii.

(b) Entry of (i) a Settlement Approved Order, and (ii) a Clarifying Order, as those terms are defined in the Statutory Direct Action Settlement Agreement, which orders shall have become a Final Order(s).

(c) Upon execution of this Hawaii Settlement Agreement, Hawaii Direct Action Settlement Counsel on behalf of all plaintiffs and putative class members in the Hawaii Direct Action Claims agree to continue to stay those actions as against Travelers pending a Final Order approving this Hawaii Settlement Agreement.

(d) Upon the Settlement Approval and Clarifying Order containing prohibitions against Claims at least as broad as those contained in Exhibit A becoming a Final Order, all named plaintiffs shall promptly dismiss with prejudice against Travelers the Hawaii Direct Action Claims and Travelers shall contemporaneously withdraw its opposition to the remand of those Hawaii Direct Action Claims set forth in section I(h)(i) and (ii), provided, however, that in no event shall any Person holding a Hawaii Direct Action Claim be permitted to file such a claim against Travelers, and Hawaii Direct Action Settlement Counsel represent that no such Person will file such a claim, and provided further that prior to continuing the prosecution of any pending Hawaii Direct Action Claim against any remaining defendant and prior to filing any new Claim against any Person or Entity other than Travelers against whom no such Claim may be made, arising out of or relating to the handling, defense, trial, appeal or settlement of any Claim or the participation or alleged participation in any way relating to the handling, defense, trial, appeal or settlement of any Claim against Combustion Engineering, Hawaii, Direct Action Settlement Counsel shall first obtain an order, which order shall have become a Final Order, approving this Settlement Agreement as a good-faith settlement as to all Persons holding Hawaii Direct Action Claims pursuant to Hawaii Rev. Stat. Ann. § 663-15.5. If Hawaii Direct Action Settlement Counsel is unable to obtain such an order, then Hawaii Direct Action Settlement Counsel shall dismiss with prejudice all currently pending Hawaii. Direct Action Claims. Nothing in this

section shall be construed as an admission, directly or indirectly, as to the existence of jurisdiction of any court or lack thereof.

3. ***Payment of Settlement Amount***

(a) Upon satisfaction of each of the conditions set forth in Paragraph 2 hereof and subject to the provisions of Paragraph 5(b) hereof, The Travelers Indemnity Company and/or Travelers Casualty and Surety Company shall pay within five (5) business days a single payment of fifteen million dollars ($15,000,000.00) to the Hawaii Direct Action Settlement Fund.

(b) The costs of implementing this Hawaii Settlement Agreement shall be subject to Section 3(b) of the Statutory Direct Action Settlement Agreement.

(c) The Settlement Amount shall be a full and final settlement. The Parties agree and jointly represent that the Settlement Amount to be paid by The Travelers Indemnity Company and/or Travelers Casualty and Surety Company pursuant to this Hawaii Settlement Agreement constitutes fair and reasonable consideration for the general releases and other protections afforded pursuant to this Hawaii Settlement Agreement.

Appendix F

4. *Hawaii Direct Action Settlement Fund*

(a) Hawaii Direct Action Settlement Counsel shall create a Hawaii Direct Action Settlement Fund into which The Travelers Indemnity Company and/or Travelers Casualty and Surety Company shall make payment in accordance with and subject to the terms of this Hawaii Settlement Agreement.

(b) The Hawaii Direct Action Settlement Fund shall be administered by the Hawaii Direct Action Settlement Fund Administrator, who shall be a Person selected by Hawaii Direct Action Settlement Counsel within thirty days of the Execution Date and who shall be authorized to commence operating under this Hawaii Settlement Agreement, and who thereafter shall be subject of a motion for approval by the Bankruptcy Court *nunc pro tunc.*

(c) The Hawaii Direct Action Settlement Fund Administrator shall be a bonded trustee or fiduciary. The Hawaii Direct Action Settlement Fund Administrator shall be required to maintain a reserve in the fund sufficient to meet any reimbursement obligation under Section 5(c) of this Hawaii Settlement Agreement. Any payments of Qualifying Claims as defined in Exhibit C hereto shall be pro-rated until such time as the obligations in Section 5(c) shall have been fully performed.

Appendix F

5. *Releases by Claimants*

(a) Any Person who receives payment from the Hawaii Direct Action Settlement Fund shall sign and deliver to Travelers a general release, in the form attached hereto as Exhibit B. To the extent applicable state law imposes any additional requirements in order to enforce in whole or in part the general releases contemplated by this Hawaii Settlement Agreement, Hawaii Direct Action Settlement Counsel agree to take all steps necessary to obtain such general releases contemplated by this Hawaii Settlement Agreement in a form that conforms with applicable state law.

(b) After the entry by the Bankruptcy Court of an Order which directs Hawaii Direct Action Settlement Counsel to communicate the terms of this settlement and other procedural matters to all potential claimants to the Hawaii Direct Action Settlement Fund, Hawaii Direct Action Settlement Counsel shall exercise best efforts to obtain general releases in this form attached hereto as Exhibit B from at least 1,500 Persons who, in the good-faith judgment of Hawaii Direct Action Settlement Counsel have Qualified Claims. All such general releases obtained prior to the satisfaction of each of the conditions precedent set forth in Sections 2(a)-(c) of the Statutory Direct Action Settlement Agreement shall be included in and credited toward the 49,000 releases described in section 2(c) of the Statutory Direct Action Settlement, and Travelers shall have the right to inspect such releases upon reasonable notice to the escrow agent. Hawaii Direct Action Settlement

Counsel agree to use best efforts to obtain such releases by all claimants who have a Qualifying Claim. All such general releases shall be executed and delivered into escrow, subject to the right of the Hawaii Direct Action Settlement Fund Administrator to deny any such claim that the Hawaii Direct Action Settlement Fund Administrator determines is not a Qualifying Claim in accordance with the procedures attached hereto as Exhibit C. The general releases delivered hereunder shall become final and non-revocable (regardless of any ruling by any court) as soon as (i) this Hawaii Settlement Agreement has been approved by a Final Order and (ii) a determination by the Hawaii Direct Action Settlement Fund Administrator has been made providing the releasing party with a right to payment from the Hawaii Direct Action Settlement Fund.

(c) Within fifteen months from the date the Hawaii Direct Action Settlement Fund begins administering claims, Travelers shall have received no less than one thousand five hundred (1,500) general releases, which have become final and non-revocable, from claimants with Qualifying Claims. In the event Traveler obtains less than 1,500 general releases from claimants with Qualifying Claims, Travelers shall be entitled to reimbursement from the Fund, computed as follows: (1/1500 x $15,000,000) x N; where N = the difference between 1,500 and the actual number of general releases issued to Travelers in accordance with this Hawaii Settlement Agreement. Claims that derived in whole or in part from a Qualifying Claim, including but not limited to claims for loss of consortium (including spousal,

children's or parental consortium), shall not be included in calculating the numbers of releases required by this section.

6. ***Attorneys' Fees***

The Parties understand and agree that the Hawaii Direct Action Settlement Fund is an entity that shall be independent of the Manville Trust, and that compensation for legal services for claims made against the Hawaii Direct Action Settlement Fund as between a claimant and his or her counsel will be subject to the contracts for legal services between a claimant and his or her counsel, and that the Order approving this Hawaii Settlement Agreement will specify that any prior Order in this case pertaining to compensation for legal services for claims made against the Manville Trust will not apply to claims against the Hawaii Direct Action Settlement Fund. Travelers further agrees that it will not challenge any of said individual contracts for legal services on any basis whatsoever.

7. ***Not Evidentiary and Not an Admission***

The Parties agree that no part of this Hawaii Settlement Agreement may be used in any proceeding as evidence of their respective rights, duties or obligations; provided, however, that this shall not apply to any proceeding in connection with or related to the interpretation, validity, enforcement or breach of this Hawaii Settlement Agreement. This Hawaii Settlement Agreement is not intended to be nor shall it be

construed as an admission of liability by Travelers and should not be construed to be a concession or admission that the Hawaii Direct Action Claims have any factual or legal merit or that the Hawaii Direct Action Claims are not in any way subject to the Manville Confirmation Order or the Manville Insurance Settlement Order. This Hawaii Settlement Agreement is nevertheless made in settlement of disputed Claims and this Hawaii Settlement Agreement shall not be used in any court or dispute resolution proceeding to create, prove or interpret any rights or obligations of Travelers. Without limiting the foregoing, this Hawaii Settlement Agreement shall be deemed to fall within the protection afforded compromises and offers to compromise by, *inter alia*, Rule 408 of the Federal Rules of Evidence and corresponding state rules.

8. ***Confidentiality***

The Parties agree that, except by order of a court of competent jurisdiction and upon notice to all Parties, all communications (written or oral) in connection with the settlement discussions leading to this Hawaii Settlement Agreement or with respect to any of the draft terms or conditions of this Hawaii Settlement Agreement shall remain confidential, and that the Parties may not seek discovery into, or seek to introduce at any trial or proceeding, pending and figure, evidence of such communications.

9. *Successors*

This Hawaii Settlement Agreement shall not be construed to inure to the benefit of any Entity other than Travelers.

10. *Amendments*

No amendments or variations of the terms of this Hawaii Settlement Agreement shall be valid unless made in writing and signed by Hawaii Direct Action Settlement Counsel and Travelers and approved by the Bankruptcy Court.

11. *Execution*

This Hawaii Settlement Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. A facsimile or telecopy of a Party's signature hereto shall be as valid, binding, and enforceable as the attend thereof.

12. *Representation of Authority*

The individuals signing this Hawaii Settlement Agreement hereby represent to each other, the Mediator and the Bankruptcy Court that they are authorized to enter into this Hawaii Settlement Agreement on behalf of all Persons whom they purport to represent and to bind their principals to this Hawaii Settlement Agreement.

Appendix F

13. *Construction*

This Hawaii Settlement Agreement is not a contract of insurance and the Parties agree that any special rules of interpretation or construction of insurance contracts shall not apply. This Hawaii Settlement Agreement is the product of arm's length negotiations between and among the Parties and counsel in a mediation ordered by the Bankruptcy Court under the auspices of the Honorable Mario Cuomo. Each of the Parties hereto has participated in the drafting of this Hawaii Settlement Agreement. Therefore, it is the intent of the Parties that no part of this Hawaii Settlement Agreement shall be construed against any other Party because of the identity of the drafter or because Travelers is an insurance company.

14. *Headings*

Paragraph headings contained herein are for purposes of organization only and shall not constitute a part of the terms of this Hawaii Settlement Agreement.

15. *Entire Agreement*

This Hawaii Settlement Agreement is an integrated agreement containing the entire understanding among the Parties regarding the matters expressly addressed herein and, except as set forth in this Hawaii Settlement Agreement, no representations, warranties or promises have been made or relied upon by the Parties to this Hawaii Settlement Agreement. This Hawaii Settlement

Agreement shall prevail over prior communications and agreements between the Parties or their representatives.

16. *Use of Singular and Plural*

For the purposes of this Agreement, unless the context otherwise requires, words in the singular include words in the plural and vice versa.

17. *Governing Law and Continuing Jurisdiction*

Except to the extent governed by the Bankruptcy Code and interpreted in accordance therewith, this Hawaii Settlement Agreement shall be governed by and construed in accordance with the laws of the State of New York. The United States Bankruptcy Court for the Southern District of New York shall have continuing and exclusive jurisdiction over this Hawaii Settlement Agreement and the Parties in respect of their relations hereunder.

18. *Best Efforts*

All Parties will use their best efforts to obtain the outcomes sought by this Hawaii Settlement Agreement, which shall include joint motion by Travelers and the Hawaii Direct Action Settlement Counsel to obtain a Final Order approving this Hawaii Settlement Agreement and entry of the Settlement Approval and Clarifying Order containing prohibitions against Claims at least as broad as those contained in Exhibit A, provided, however, that nothing contained herein shall be construed to require, and the parties agree, that Travelers shall not be required,

to disclose the identity of any of its policyholders to any Person, including but not limited to Settlement Counsel, Hawaii Settlement Counsel, the Direct Action Settlement Fund Administrator, the Hawaii Direct Action Settlement Fund Administrator or any arbitrator.

19. ***Correspondence***

Each of the Parties shall be provided with notice of any dispute concerning this Hawaii Settlement Agreement or its interpretation or effect. Any such notice or communications shall be addressed and sent in writing, by registered or certified mail, return receipt requested, to the attention of the persons identified below (or as the Parties may subsequently direct in writing):

(1) If to Hawaii Direct Action Settlement Counsel:

Galiber, DeRobertis Nakamurs Ono Takitani
610 Ward Avenue, Suite 200
Honolulu, III 96814-3308
Attn: Gary O. Galiber, Esq.

(2) If to Travelers:

General Counsel —
Environmental Litigation Group
Travelers Indemnity Company
One Tower Square
Hartford, CT 06183-6016

Appendix F

(3) If to the Direct Action Settlement Fund Administrator:

To be provided upon appointment.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, affix their signatures hereto and direct Travelers counsel to deposit a copy thereof with the Mediator, whereupon it shalt become effective:

THE TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY AND TRAVELERS PROPERTY CASUALTY CORP.

By: s/ Thomas J. Joyce Witness: s/ Michael J. Eisele

Name: Thomas J. Joyce

Title Vice President

Date: 5/21/04

SETTLEMENT COUNSEL

By: Gary Galiher Witness: s/ [illegible]

Name: Gary Galiher, Esquire of Galiher, DeRobertis Nakamura Ono Takitani

Date: 5-22-04

APPENDIX G — SECOND AMENDED SCHEDULING ORDER WITH EXHIBIT A OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 9, 2004

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case Nos. 82 B 11656,
82 B 11657, 9213 11660,
82 B 11661, 82 B 11665 through
82 B 11673 inclusive,
82 B 11675, 82 B 11676 (BRL)

In re

JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

SECOND AMENDED SCHEDULING ORDER (A) ESTABLISHING HEARING ON MOTION TO APPROVE SETTLEMENT OF COMMON LAW DIRECT ACTION CLAIMS, AND CERTAIN RELATED PROCEDURES, AND (B) APPROVING FORM AND MANNER OF THE RELATED NOTICES

WHEREAS, on June 19, 2002, The Travelers Indemnity Company, Travelers Casualty and Surety Company (formerly The Aetna Casualty and Surety Company) and Travelers Property Casualty Company, on their behalf and on behalf of their present and former

affiliates, including, without limitation, Citigroup, Inc., Travelers Insurance Company and Travelers Life and Annuity Company (collectively, "Travelers"), filed a Motion for Temporary Restraining Order and Preliminary Injunction, dated June 19, 2002 (*"PI Motion"*)[1].

WHEREAS, thereafter, the United States Bankruptcy Court for the Southern District of New York ("Court") (1) on the same date, granted a temporary restraining order prohibiting further prosecution, as against Travelers, of twenty-six lawsuits ("June 19 TRO"), (2) on July 2, 2002, entered an order approving a stipulation entered into by the parties, including plaintiffs in all of the enumerated lawsuits, consenting to the continuation of the June 19 TRO and (3) on August 1, 2002, held a hearing on the PI Motion ("Initial Hearing").

WHEREAS, notice of the Initial Hearing was provided to counsel for all plaintiffs who had asserted the above-referenced direct action lawsuits against Travelers, the Trustees of the Manville Personal Injury Settlement Trust ("Manville Trust"), and counsel for the Beneficiaries of the Manville Trust, and the Court received extensive briefing from the parties.

WHEREAS, at the Initial Hearing and by Order dated August 1, 2002 (Docket # 3446), the Court

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1. Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

referred the matter to mediation and appointed the Honorable Mario M. Cuomo as mediator ("Mediator").

WHEREAS, after notice and a hearing held on January 27, 2003 ("Supplemental Hearing"), this Court entered a Supplemental Order to Show Cause and Restraining Order, *inter alia*, enjoining further prosecution of additional cases as against Travelers (Docket # 3474) ("First *Supplemental Injunction*").

WHEREAS, after notice and a hearing held on June 24, 2003 ("*Second Supplemental Hearing*"), the Court entered the Second Supplemental Order to Show Cause, *inter alia*, enjoining further prosecution of additional cases as against Travelers (Docket # 3501) ("*Second Supplemental Injunction*" and together with the June 19 TRO and the First Supplemental Injunction, collectively, the "*Injunctions*").

WHEREAS, after the Second Supplemental Injunction certain additional lawsuits were, as stipulated by plaintiffs, inadvertently served upon Travelers.

WHEREAS, Travelers and counsel for the common law direct action plaintiffs ("*Common Law Direct Action Settlement Counsel*") negotiated a definitive settlement agreement under the auspices of the Mediator.

WHEREAS, Travelers and the Common Law Direct Action Settlement Counsel executed a Settlement Agreement on May 21, 2004.

Appendix G

WHEREAS, Travelers and the Common Law Direct Action Settlement Counsel will be filing motions to approve the Common Law Direct Action Settlement and for entry of an order clarifying the scope of the Confirmation Order herein, including the Insurance Settlement Order and Channeling Injunction contained therein ("*Clarifying Order*") and approval of a related settlement (collectively, the "*Common Law Settlement Motion*").

WHEREAS, the Common Law Settlement Motion relates to the rights of persons or entities to assert claims bringing suit against Travelers for asbestos-related personal injuries or wrongful death based on allegations that Travelers failed to warn against the hazards of asbestos or that Travelers should be held liable under theories of negligence, conspiracy, failure to warn, voluntary undertaking, or other claims based on Travelers alleged knowledge of the hazards of asbestos ("*Affected Claimants*"), which claims Travelers contends have been permanently enjoined by this Court's Confirmation Order including the Insurance Settlement Order and Channeling Injunction contained therein.

WHEREAS, the Court intends to hold a hearing on the Common Law Settlement Motion, which hearing was initially scheduled to be held before the Honorable Burton R. Lifland, United States Bankruptcy Judge, in Courtroom 623 at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004-1408, on March 15,

2004 through March 17, 2004 and which has been adjourned in conjunction with the mediation.

WHEREAS, the parties propose to provide notice of the Common Law Settlement Motion, the Hearing and related deadlines and procedures for filing objections thereto, via first class mail, to all persons or entities, who according to the records on file with the Claims Resolution Management Corporation ("CRMC"), filed a claim against Johns-Manville or the Manville Personal Injury Settlement Trust substantially in the form attached hereto as Exhibit A ("*Manville Claimants' Notice*") pursuant to Section 105 of the Bankruptcy Code and Rule 2002 of the Federal Rules of Bankruptcy Procedure ("*Bankruptcy Rules*").

WHEREAS, the parties propose to provide notice of the Common Law Settlement Motion, the Hearing and related deadlines and procedures for filing objections thereto, via first class mail, to all persons or entities and their counsel, who according to the records on file with the Claims Resolution Management Corporation ("CRMC"), filed a claim against Johns-Manville or the Manville Personal Injury Settlement Trust substantially in the form attached hereto as Exhibit B ("*Manville Claimants' Counsel Notice*") pursuant to Section 105 of the Bankruptcy Code and Rule 2002 of the Federal Rules of Bankruptcy Procedure ("*Bankruptcy Rules*").

WHEREAS, the parties propose to publish the notice substantially in the form attached hereto as

Exhibit C ("*General Notice*") in at least two national daily publications and such other and further publications as the parties deem appropriate.

NOW THEREFORE, upon the request of the parties, pursuant to ¶28 of this Court's Confirmation Order, Sections 105, 1141(a) and 1142(a) of the Bankruptcy Code, for an order ("Amended Scheduling Order") (i) establishing a hearing on the Common Law Settlement Motion, (ii) establishing procedures and deadlines concerning the foregoing hearing, and (iii) approving the form and manner of notices relating thereto; and the Court, having obtained recommendations from the Mediator; and upon the record of these cases; and after due deliberation thereon; and good and sufficient cause appearing therefore; IT IS HEREBY:

FOUND THAT:

A. As set forth in the declaration of David T. Austern, Esq., dated March 23, 2004, and filed with the Court, the Manville Trust may be used to determine individuals who have filed asbestos-related personal injury or wrongful death claims against asbestos defendants. According to the records of the CRMC, in excess of 98% of all individuals who filed asbestos claims against any defendant appear to have filed claims against the Trust. The CRMC, through use of its database, can identify the names and addresses of virtually all Affected Claimants who filed a claim against Johns-Manville or the Manville Personal Injury

Settlement Trust. The CRMC database provides the best and most comprehensive means of identifying all Affected Claimants. Notice to the Affected Claimants as identified by the CRMC database and the publication notices described herein, constitute good and sufficient notice of the hearing of the Common Law Settlement Motion.

B. The General Notice is approved pursuant to Bankruptcy Rule 2002(1) regarding the hearing on the Common Law Settlement Motion and related deadlines and procedures for filing objections thereto; and it therefore:

ORDERED THAT:

1. This Scheduling Order shall govern the following notice and scheduling procedures relating to the hearing on the Common Law Settlement Motion ("*Hearing*").

2. The following schedule of dates and deadlines is hereby established for the above-captioned Chapter 11 cases. Only those objections that are timely filed, served and received will be considered by the Court at the Hearing and no person shall be heard who has not filed a timely appearances in accordance with the following schedule.

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A. *Pretrial Conference*

3. A pretrial conference addressing the Hearing, to the extent necessary, will be held on June 30, 2004 at 10:00 am.

B. *Hearing on the Common Law Settlement Motion*

4. The Hearing on the Common Law Settlement Motion will take place on July 6, 2004, commencing at 10:00 a.m., in Courtroom 623 at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004-1408. The hearing is scheduled for two days.

B. *Briefing*

5. Given the extensive briefing that has already taken place in this matter, any party may rely on prior submissions filed with the Court, in lieu of additional briefing, by filing a notice on the Court's electronic filing system of such party's intent to so rely and identifying the pleading or pleadings previously submitted.

6. Travelers shall file its opening brief in connection with the Common Law Settlement Motion with the Court on or before June 7, 2004.

7. Any person wishing to appear, oppose or otherwise object to the relief requested in connection with the Common Law Settlement Motion shall file an

appearance or appearances and set forth such opposition or objection in a writing describing the basis therefore, which shall be filed on or before June 28, 2004. Objecting parties who intend to offer testimony or present evidence at the Hearing shall identify in their objections any fact or expert witnesses they intend to call, and any exhibits they intend to offer.

8. Travelers' reply brief, if any, shall be filed with the Court on or before July 2, 2004.

C. *Approval Of Form And Manner Of Notices And Notice Deadlines*

9. CRMC shall provide from its databases to Travelers and their representatives, for a reasonable agreed upon fee by May 31, 2004, a listing of all Affected Claimants, together with the names of such Affected Claimants' counsel, as well as any other information in the possession, custody or control of CRMC that would facilitate identification and mailing to Affected Claimants.

10. Travelers is directed to cause the Manville Claimants' Notice and the Manville Claimants' Counsel Notice, to be sent, by first class mail, on or before June 7, 2004 to all Affected Claimants and their counsel according to the records provided by CRMC.

11. The General Notice shall be published and/or broadcast on or before June 13, 2004 in at least two national publications an in such publications or broadcast media as may be appropriate.

12. Travelers and Common Law Direct Action Settlement Counsel and their representatives are permitted to take such other and further steps deemed appropriate to notify Affected Claimants of the Common Law Settlement Motion and related deadlines and procedures for filing objections thereto.

13. Common Law Direct Action Settlement Counsel and their representatives are permitted to communicate the details of the Settlement with any individual who contacts them to inquire about the Settlement:

14. The notices described herein, including the Manville Claimants' Notice Manville, Claimants' Counsel Notice and General Notice, and notice procedures provided for herein as respects the Common Law Settlement Motion are hereby approved as good, sufficient and effective. Such notices shall be deemed to satisfy the requirements of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules of the United States Bankruptcy Court for the Southern District of New York with respect thereto.

MISCELLANEOUS

15. All briefs and written submissions in connection with the Common Law Direct Action Settlement Motion shall be filed with the Court electronically, with a hard-copy delivered directly to Chambers *by hand*, in accordance with General Order M-242 (General Order M-242 and-the User's Manual for the Electronic Case Filing System can be found at *www.nysb.uscourts.gov*,

the official website for the United States Bankruptcy Court for the Southern District of New York), by registered users of the Court's case filing system and, by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect or any other Windows-based word processing format.

16. In addition to filing all briefs and written submissions in connection with the Common Law Settlement Motion with the Court, such submissions shall be served in accordance with General Order M-242 upon: (i) Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, New York 10017, Attention: Andrew T. Frankel, Esq. (Facsimile: 212-455-2502), Attorneys for Travelers, (ii) Caplin & Drysdale Chartered, 399 Park Avenue, 27th Floor, New York, New York 10022-4614, Attention: Elihu Inselbuch, Esq. (Facsimile: 212-644-6755), Attorneys for the Beneficiaries of the Manville Personal Injury Settlement Trust, (iii) Manville Personal Injury Settlement Trust, 3110 Fairview Park Drive, Suite 200, P.O. Box 12003, Falls Church, Virginia 22042-0683, Attention: David T. Austern, Esq. (Facsimile: 743-205-6249); (iv) Davis, Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017. Attention L. Gordon Harriss, Esq. (Facsimile 212-450-3172) (v) Law Offices of Lawrence Madeksho, 8866 Gulf Freeway, Suite 440, Houston, TX 77017, Attention: Lawrence Madeksho, Esq. (Facsimile:713-910-02505), Coordinating Counsel for Certain Common Law Direct Action Claimants; (vi) Paul, Weiss, Rifkind Wharton & Garrison, 1285 Avenue of the Americas, New York, New

York 10019-6064, Attention: Leslie Fagen, Esq. (vii) Johns-Manville Corporation, P.O. Box 5108, Denver, Colorado 80202, Attention: Dion Persson, Esq.; (viii) Shea & Gardner, 1800 Massachusetts Avenue, N.W., Suite 1800, Washington, DC 20036, Attention: John Aldcock, Esq., (ix) Becker, Glynn, Melamed & Muffly LLP, 299 Park Avenue, 16th Floor, New York, New York 10171, Attention: Lani Adler, Esq.; (x) Legal Analysis Systems, 970 Calle Arroyo, Thousand Oaks, California 91360, Attention: Mark A. Peterson, Esq.; (xi) Pepper Hamilton LLP, 3300 Two Logan Square, Eighteenth & Arch Streets, Philadelphia, Pennsylvania 19103, Attention: Francis J. Lawall, Esq.; (xii) Fried Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004, Attention: Matthew Gluck, Esq.; (xiii) Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, DC 20004, Attention: Andrew H. Marks, Esq. (Facsimile 202-628-5116); (xiv) Steptoe & Johnson LLP, 1330 Connecticut Avenue N.W., Washington, DC 20036, Attention: Harry Lee, Esq. (Facsimile 202-429-3902); and (xv) Office of the-United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004.

17. Nothing herein shall be deemed to be a determination with respect to the Common Law Direct Action Settlement Motion.

18. No party in interest shall be precluded from making any application to the Court to supplement the terms of this Scheduling Order or to seek any ancillary or related relief.

19. All prior injunctions, restraining orders and related orders shall be and are hereby extended through the Hearing.

20. Notwithstanding any Bankruptcy Rule to the contrary, this Order shall take effect immediately upon its entry.

Dated: New York, New York
June 9, 2004

/s/ Burton R Lifland
UNITED STATES BANKRUPTCY JUDGE

Appendix G

Exhibit A

June 6, 2004

If you filed or resolved an asbestos-related personal injury or wrongful-death claim or may do so in the future, your rights to file claims against Travelers Property Casualty Company and affiliated Travelers entities may be affected if a settlement is approved by the Court.

A settlement has been reached of certain lawsuits that may affect you. If the settlement is approved, you will be barred from bringing suit against Travelers for asbestos-related personal injuries or wrongful death based on allegations that Travelers failed to warn against the hazards of asbestos or that Travelers should be held liable under theories of negligence, conspiracy, failure to warn, voluntary undertaking, negligent inspection or other claims based on Travelers alleged knowledge of the hazards of asbestos. The settlement does not affect the rights of persons to recover insurance proceeds under insurance policies issued to such persons, such as life insurance benefits or disability benefits covered under a Travelers policy. In addition, the settlement does not affect the previously announced statutory direct action settlement or your right to payment under the statutory direct action fund. Under the proposed settlement, you may be eligible to receive money from a settlement fund to be established under the terms of the settlement. Your compensation, if any, cannot be determined until fund distribution procedures

are finalized and approved by the Court and until it is determined how many individuals will or may participate in the settlement. However, the settlement and a related order, if approved, will affect your right to bring a claim against Travelers whether or not you are eligible for payment. A condition of the settlement is that the Court enter an order ("Proposed Order") interpreting and enforcing certain prior orders entered by the Johns-Manville Bankruptcy Court as barring the claims described below (see Who's Affected?). If you are affected, you may object to the settlement or entry of the Proposed Order, even if you do not qualify for payment.

If you are represented by an attorney in connection with your asbestos-related personal injury or wrongful-death claim, please contact that attorney for further information about this settlement.

The United States Bankruptcy Court for the Southern District of New York authorized this notice. The Court has scheduled a hearing on July 6, 2004, to consider whether to approve the settlement so that benefits may be paid and to consider whether to enter the Proposed Order. Do not contact the Court or the Clerk of the Court about this notice.

WHO'S AFFECTED?

The settlement and Proposed Order would affect all persons and entities, whether or not eligible to receive money under the settlement, who have asserted or may

assert claims for asbestos-related personal injuries or wrongful death against The Travelers Indemnity Company, Travelers Casualty and Surety Company (formerly known as The Aetna Casualty and Surety Company), Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective present and former direct or indirect parents, subsidiaries and affiliates other than The St. Paul Companies (collectively "Travelers") that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos. In addition, if you have filed a claim against the Manville Trust and have executed a release releasing claims allegedly resulting from exposure to asbestos and/or asbestos containing products that were manufactured, distributed or sold by Manville or its affiliates you will be prohibited from filing such claims against Travelers.

As noted above, the settlement is not intended to affect the rights of persons to recover insurance proceeds under insurance policies issued to such persons, such as life insurance benefits or disability benefits covered under a Travelers policy, or the rights of persons to file a claim with the statutory direct action settlement fund.

For more information as to whether you may be affected you should obtain copies of the Settlement Agreement and by following the instructions below.

Appendix G

WHAT'S THIS ABOUT?

Certain asbestos-related personal injury or wrongful death lawsuits have been filed in Texas, Ohio and elsewhere claiming that Travelers should be held liable (along with other parties such as manufacturers, sellers and distributors of asbestos-containing products and others) for allegedly failing to disclose information concerning the hazards of asbestos or for negligence, conspiracy, voluntary undertaking, negligent inspection and other legal theories relating to Travelers, alleged knowledge of asbestos that Travelers is alleged to have obtained from its insurance-related activities. Travelers denies these allegations and has asserted many defenses. In the lawsuits recently filed in Texas and Ohio against Travelers and other insurers, all courts that have ruled on the legal merits of these cases to date have dismissed these cases as against insurers on the basis that such lawsuits cannot properly be asserted against insurers. In addition to these defenses, Travelers has filed a motion contending that the lawsuits and all similar claims asserted against it are barred by prior Court orders and injunctions entered in the Manville bankruptcy.

This settlement includes a resolution of these lawsuits. A condition of the settlement is that the Court enter the Proposed Order barring lawsuits against Travelers of this type. The settlement is not an admission of wrongdoing or an indication that any law was violated.

Appendix G

WHAT COULD YOU GET FROM THE SETTLEMENT?

If the settlement is approved, there will be an aggregate Settlement Fund of $70 million for qualified claimants. Compensation for injuries will be shared amongst all qualified claimants in varying amounts based upon each qualified claimant's specific injuries. Eligibility will be determined in fund distribution procedures that will be submitted to the Court for approval. Claimants must show that they have asbestos-related personal injuries or a claim for wrongful death as well as other criteria that will be part of the distribution procedures. The distribution procedures will be available publicly in advance of the hearing described below from [website] or by calling [xxx-xxx-xxxx]. The fund distribution procedures will contain important information as to whether you may be eligible to payment under the settlement, deadlines for filing a claim and similar information. There can be no guaranty of any minimum recovery at this time. It is anticipated that claim values will be adjusted over time depending upon the number of claims submitted to the fund.

Settlement counsel at the following firms were involved in the creation of the settlement fund: (i) Law Office of Lawrence Madeksho, (ii) Law Offices of Bruce Carter, (iii) Bevan & Associates LPA Inc., (iv) The Bogdan Law Firm, (v) Law Offices of R. Bryan Nace, (vi) Richardson, Patrick, Westbrook & Brickman, LLC, (vii) Martin & Jones, (viii) The Lanier Law Firm, and (ix) The Simmons Firm LLC. Settlement Counsel will receive a fee of

$20 million, subject to Court approval, for the creation of the settlement fund.

HOW DO YOU FIND OUT IF YOU QUALIFY FOR PAYMENT?

Call [xxx xxx-xxxx] toll-free, seven days a week between the hours of 9 am and 9 pm ET or visit [website] to obtain a copy of the Settlement Agreement and the Fund Distribution Procedures when they are available, which will help you to determine if you qualify and direct you as to how you may obtain and file a settlement fund claim form and release. To qualify for a payment, you must send in a settlement fund claim form providing information concerning your prior asbestos-related claim as well as sign a general release. As indicated above, the fund distribution procedures will contain important information as to whether you may be eligible to payment under the settlement, deadlines for filing a claim and similar information. These procedures will be subject to Court approval.

WHAT ARE YOUR OPTIONS?

Although your rights will be affected if the Court approves the settlement and enters the Proposed Order, you are not required to take any action in response to this notice. You may, however, decide to participate and submit a settlement fund claim form, and/or you may decide to object to the settlement or entry of the Proposed Order. **Information on how to object can be found in the scheduling order. You may obtain**

copies of the scheduling order from [*website*], or by calling [xxx-xxx-xxxx] toll-free, seven days a week between the hours of 9 am and 9 pm ET. All objections must be filed with the Court no later than June 28, 2004 In accordance with the procedures contained in the scheduling order. If any one person's objections are successful, there will be no settlement fund and no one will receive a payment. There will be a hearing on July 6, 2004 in this case *(In re JOHNS-MANVILLE CORPORATION, et al., Case Nos. 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82 B 11673 inclusive, 82 B 11675, 82 B 11676 (BRL))*, before the Honorable Burton R. Lifland, United States Bankruptcy Judge, in Courtroom 623 at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004 to consider whether to approve the settlement and, if approved to establish the Settlement Fund, to enter the Proposed Order and to approve the compensation to Settlement counsel. If the settlement is approved, the Court will enter an order pursuant to its prior orders barring the claims that are described above (see "Who's Affected?"). You may appear at the hearing, but you don't have to. For more details, call toll-free [xxx-xxx-xxxx] seven days a week between the hours of 9 am and 9 pm ET, or go to [website].

JOINT APPENDIX

122 (14) (11)

Nos. 08-295 & 08-307

Supreme Court, U.S.
FILED
MAR 6 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, ET AL.,

Petitioners,

—v.—

PEARLIE BAILEY, ET AL.,

Respondents.

COMMON LAW SETTLEMENT COUNSEL,

Petitioners,

—v.—

PEARLIE BAILEY, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 2008
CERTIORARI GRANTED DECEMBER 12, 2008

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 06-2099-bk

Relevant Docket Entries

Date	Description
4/28/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT OneBeacon America Insurance Company, filed. Fee paid in District Court, receipt # 577718
4/28/06	Copy of district court opinion and order, dated 03/28/06, RECEIVED. Before: Honorable John G. Koeltl, USDJ, SDNY
4/28/06	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court)
5/5/06	Statement of issues filed by Attorneys for Appellants, the Asbestos Personal Injury Plaintiffs, with proof of service
5/5/06	Designation of record on appeal FILED by Attorneys for Appellants, the Asbestos Personal Injury Plaintiffs, with proof of service

5/12/06	1st supplemental index in lieu of supplemental record filed
5/16/06	Counter designation of record on appeal FILED by Common Law Settlement Counsel, plaintiff-appellees
5/31/06	Appellant OneBeacon America Insurance Company motion withdraw appeal filed with proof of service
6/14/06	Certified copy of order dated 06/14/06 disposing of the appeal issued to district court (Judge Koeltl, USDC, SDNY/NYC)
6/14/06	Notice to counsel in re: Mandated copy of Order granting OneBeacon's motion to withdraw from the appeal
6/14/06	Order FILED GRANTING motion withdraw appeal by Appellant OneBeacon America Insurance Company, endorsed on motion dated 6/8/2006 IT IS HEREBY ORDERED THAT the motion is GRANTED. Endorsed: AA TWY
7/31/06	Memo of law in support of the motion consolidate appeals filed with proof of service
7/31/06	Appellee-Cross-Appellant Travelers Casualty, Appellee-Cross-Appellant Travelers Indemnity Company, Appellee-Cross-Appellant Surety Company, et al motion consolidate appeals filed with proof of service
8/14/06	Asbestos Personal Injury Plaintiff's response in opposition to Travelers' Memorandum in support of its motion to con-

	solidate appeals filed with proof of service
8/24/06	Travelers' reply memo in further support of the motion consolidate appeals filed with proof of service
10/13/06	Order FILED GRANTING motion consolidate appeals by Appellee-Cross-Appellant Travelers Casualty, Appellee-Cross-Appellant Travelers Indemnity Company, Appellee-Cross-Appellant Surety Company, Appellee-Cross-Appellant Travelers Property Casaulty Corp., Appellee-Cross-Appellant Travelers Casaulty and Surety Company Upon due consideration, it is ORDERED that (1) the motion to consolidate the appeal in 06-3317 with the appeal in 06-2320 is GRANTED; (2) the parties are instructed to file within 20 days supplemental briefs, not to exceed 15 double-spaced pages, discussing the relevance, if any, of Eberhart v. United States, ___ U.S. ___, 126 S. Ct. 403 (2006), on (a) the standard to be used by the Court of Appeals in adjudicating a motion to dismiss a cross-appeal on grounds of untimeliness, (b) the standard to be used by the District Court in adjudicating a motion for enlargement of time to file a cross-appeal, (c) the standard to be used by the Court of Appeals in reviewing the District Court's denial of the motion for enlargement of time to file a cross-appeal, and (d) the continuing validity of this Court's decisions in Finkielstain v. Seidel,

857 F.2d 893 (2d Cir. 1988), Texport Oil Co. v. M/V Amolyntos, 11 F.3d 3612 (2d Cir. 1993), Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355 (2d Cir. 2003), and Rangolan v. County of Nassau, 370 F.3d 239 (2d. Cir. 2004). Before: JON, JAC, RDS Endorsed: LC

10/16/06 APPELLANT Chubb Indemnity Insurance Company, brief FILED with proof of service

10/16/06 APPELLANT Cascino Asbestos Claimants, brief FILED with proof of service

10/16/06 APPELLANT Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants, Chubb Indemnity Insurance Company, Continental Casualty Company, ET AL , joint appendix filed w/pfs. 3 volumes of joint appendix

10/16/06 APPELLANT Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants, Chubb Indemnity Insurance Company, Continental Casualty Company, ET AL , special appendix filed(w/pfs)

10/17/06 APPELLANT Continental Casualty Company, brief FILED with proof of service

11/2/06 APPELLANT Asbestos Personal Injury Plaintiffs, General Cole, Lee Anthony, Pearlie Bailey, ET AL , supplemental brief filed with proof of service

11/2/06 APPELLEE-CROSS-APPELLANT Surety Company, Travelers Casaulty and Surety Company, Travelers Casualty, Travelers

Indemnity Company, ET AL , supplemental brief filed with proof of service

11/15/06 APPELLEE Common Law Settlement Counsel, brief filed with proof of service

11/15/06 APPELLEE Hawaii Plaintiffs, Statutory Direct Action Plaintiffs, brief filed with proof of service

11/15/06 APPELLEE-CROSS-APPELLANT Surety Company, Travelers Casaulty and Surety Company, Travelers Casualty, Travelers Indemnity Company, ET AL , brief filed with proof of service

11/27/06 Appellant Continental Casualty Company motion dismiss the appeal filed with proof of service

12/4/06 APPELLANT Cascino Asbestos Claimants, reply brief filed with proof of service

12/4/06 APPELLANT Asbestos Personal Injury Plaintiffs, General Cole, Lee Anthony, Pearlie Bailey, ET AL , reply brief filed with proof of service

12/4/06 APPELLANT Chubb Indemnity Insurance Company, reply brief filed with proof of service

12/18/06 APPELLEE-CROSS-APPELLANT Surety Company, Travelers Casaulty and Surety Company, Travelers Casualty, Travelers Indemnity Company, ET AL , reply brief filed with proof of service

12/20/06	Non-dispositive stip FILED. Appellant Continental Casaulty Company's stipulation to withdraw its appeal
12/20/06	Order FILED MOOTING motion dismiss the appeal by Appellant Continental Casualty Company, endorsed on motion dated 11/27/2006 IT IS HEREBY ORDERED THAT the motion is moot in light of the parties stipulation withdrawing the appeal
11/16/07	Case heard before: CALABRESI, SOTOMAYOR, WESLEY, C.JJ.
2/15/08	Judgment of the district court is Vacated and the case REMANDED by published signed opinion filed. (RCW)
2/15/08	Judgment filed
2/29/08	Appellee Common Law Settlement Counsel Petition for rehearing and petition for rehearing en banc filed with proof of service
2/29/08	Appellee-Cross-Appellant Travelers Casualty, Appllee-Cross-Appellant Travelers Indemnity Company, Appellee-Cross-Appellant surety Company, et al Petition for rehearing and petition for rehearing en banc filed with proof of service
3/17/08	Errata sheet re: filed
5/8/08	Order FILED DENYING motion Petition for rehearing by Appellee Common Law Settlement Counsel, Order FILED DENYING motion petition for rehearing en banc by Appellee Common Law Settlement Counsel. (FP)

5/8/08	Order FILED DENYING motion Petition for rehearing by Appellee-Cross-Appellant Travelers Casualty, Appellee-Cross-Appellant Travelers Indemnity Company, Appellee-Cross-Appellant Surety Company, Appellee-Cross-Appellant Travelers Property Casaulty Corp., Appellee-Cross-Appellant Travelers Casaulty and Surety Company, endorsed on motion dated 2/29/2008, Order FILED DENYING motion petition for rehearing en banc by Appellee-Cross-Appellant Travelers Casualty, Appellee-Cross-Appellant Travelers Indemnity Company, Appellee-Cross-Appellant Surety Company, Appellee-Cross-Appellant Travelers Property Casaulty Corp., Appellee-Cross-Appellant Travelers Casaulty and Surety Company, endorsed on motion dated 2/29/2008. (FP)
6/26/08	Judgment MANDATE ISSUED. CLOSED
12/16/08	Writ of Certiorari GRANTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 06-2103-bk

Relevant Docket Entries

Date	Description
4/28/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Asbestos Personal Injury Plaintiffs, Pearlie Bailey, Shirley Melvin, filed. Fee paid in Distric Court, receipt # E577696
4/28/06	Copy of district court opinion and order, dated 03/28/06, RECEIVED. Before: Honorable John G. Koeltl, USDJ, SDNY
4/28/06	Copy of district court judgment, dated 03/31/06, RECEIVED. Endorsed by J. Michael McMahon, Clerk of Court, USDC, SDNY
5/11/06	FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE THE LEAD APPEAL, DOCKET NUMBER 06-2099-bk
5/16/06	Counter designation of record on appeal FILED by Common Law Settlement Counsel, plaintiff-appellees

11/16/07	Case heard before: CALABRESI, SOTOMAYOR, WESLEY, C.JJ.
2/15/08	Judgment of the district court is Vacated
2/15/08	Judgment filed
6/26/08	Judgment MANDATE ISSUED. CLOSED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 06-2105-bk

Relevant Docket Entries

Date	Description
4/28/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Continental Casualty Company, filed. Fee receipt paid in District Court, receipt # E 577753
4/28/06	Copy of district court opinion and order, dated 03/28/06, RECEIVED. Before: Honorable John G. Koeltl, USDJ, SDNY
4/28/06	Note RELATED case number(s): 06-2103-bk
5/5/06	FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE TIIE LEAD APPEAL, DOCKET NUMBER 06-2099-bk
5/16/06	Counter designation of record on appeal FILED by Common Law Settlement Counsel, plaintiff-appellees
11/16/07	Case heard before: CALABRESI, SOTOMAYOR, WESLEY, C.JJ.

2/15/08	Judgment of the district court is Vacated and the case REMANDED by published signed opinion filed. (RCW)
2/15/08	Judgment filed
6/26/08	Judgment MANDATE ISSUED. CLOSED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 06-2118-bk

Relevant Docket Entries

Date	Description
4/28/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Cascino Asbestos Claimants, filed. Fee paid in District Court, fee receipt # E577719
4/28/06	Copy of district court judgment, dated 03/31/06,RECEIVED. Endorsed: J. Michael McMahon, Clerk of Court, USDC, SDNY
4/28/06	Note RELATED case number(s): 06-2103-bk, 06-2105-bk
5/8/06	FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE THE LEAD APPEAL, DOCKET NUMBER 06-2099-bk
5/16/06	Counter designation of record on appeal FILED by Common Law Settlement Counsel, plaintiff-appellees
11/16/07	Case heard before: CALABRESI, SOTOMAYOR, WESLEY, C.JJ.

2/15/08	Judgment of the district court is Vacated and the case REMANDED by published signed opinion filed. (RCW)
2/15/08	Judgment filed
6/26/08	Judgment MANDATE ISSUED. CLOSED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 06-2186-bk

Relevant Docket Entries

Date	Description
5/2/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Chubb Indemnity Insurance Company, filed. Fee paid in District Court, fee receipt 577850
5/2/06	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court). For 04-cv-8001. Note: The appeal at hand, 06-2186, were a result of two cases consolidated at the district court. The lead case at the district court was numbered 04-cv-8001, the consolidated case was numbered 04-cv-8048
5/8/06	Copy of district court opinion and order, dated 03/28/06, RECEIVED. Before: Honorable John G. Koeltl, USDJ, SDNY
5/16/06	FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE THE LEAD APPEAL, DOCKET NUMBER 06-2099-bk

5/16/06	Counter designation of record on appeal-FILED by Common Law Settlement Counsel, plaintiff-appellees
11/16/07	Case heard before: CALABRESI, SOTOMAYOR, WESLEY, C.JJ.
2/15/08	Judgment of the district court is Vacated and the case REMANDED by published signed opinion filed. (RCW)
2/15/08	Judgment filed
6/26/08	Judgment MANDATE ISSUED. CLOSED

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 1:04-cv-08001-JGK

Relevant Docket Entries

Date	No.	Description
10/12/04	1	NOTICE OF APPEAL FROM THE BANKRUPTCY COURT TO THE S.D.N.Y. from the Order of Judge Burton R. Lifland dated August 17, 2004. Bankruptcy Court Case Numbers: 82-11656 (BRL). Certified copies of file received.Document filed by Continental Casualty Company. Appellant Brief due by 10/27/2004
10/12/04	2	DESIGNATION OF BANKRUPTCY RECORD ON APPEAL re: 1 Bankruptcy Appeal. Document filed by Appellant Continental Casualty Company
10/12/04	3	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travelers Indemnity Company

10/12/04	4	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Common Law Settlement Counsel
10/12/04	5	Bankruptcy Court Clerks Certificate of Record on Appeal
10/12/04	6	ADDENDUM TO COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travelers Indemnity Company
10/14/04	9	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as related to 04-cv-8048 (LAK). Document filed by Continental Casualty Company
10/20/04	12	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as related to 04-cv-8048 (LAK) and 04-cv-8094 (KMW). Document filed by Statutory Direct Action Plaintiffs, Hawaii Plaintiffs
10/27/04	13	Appellant's BRIEF. Document filed by Continental Casualty Company. Appellee Brief due by 11/11/2004
11/16/04	16	MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss*. Document filed by Statutory Direct Action Plaintiffs

11/16/04	17	MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Statutory Direct Action Plaintiffs
12/3/04	35	ORDER consolidating for all purposes 04 civ. 8001, 8048, 8094, 8441 as set forth in this document. (Signed by Judge John G. Koeltl on 12/2/04)
12/6/04	24	MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Common Law Settlement Counsel
12/17/04	25	MEMORANDUM OF LAW in Opposition re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Chubb Indemnity Insurance Co.
12/17/04	26	Appellee's BRIEF. Document filed by Hawaii Plaintiffs, Statutory Direct Action Plaintiffs. Appellant Reply Brief due by 12/31/2004
12/17/04	27	MEMORANDUM OF LAW in Opposition re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Continental Casualty Company

12/17/04	28	Appellee's BRIEF. Document filed by Travelers Indemnity Company. Appellant Reply Brief due by 12/31/2004
12/17/04	30	Appellee's BRIEF. Document filed by Common Law Settlement Counsel. Appellant Reply Brief due by 12/31/2004
1/10/05	37	Appellant's REPLY BRIEF. Document filed by Chubb Indemnity Insurance Co.
1/10/05	38	Appellant's REPLY BRIEF. Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
1/10/05	39	Appellant's REPLY BRIEF. Document filed by Continental Casualty Company
1/10/05	40	Appellant's REPLY BRIEF. Document filed by Onebeacon America Insurance Company
1/10/05	41	REPLY MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Statutory Direct Action Plaintiffs, Hawaii Plaintiffs
1/10/05	42	Appellant's REPLY BRIEF. Document filed by Onebeacon America Insurance Company
1/10/05	43	REPLY MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss

		Plaintiff Appellee's Notice of Motion To Dismiss.. Document filed by Common Law Settlement Counsel. Filed In Associated Cases: 1:04-cv-08001-JGK,1:04-cv-08048-JGK,1:04-cv-08094-DAB,1:04-cv-08441-UA
1/27/05	51	Appellee's BRIEF. Document filed by Travelers Indemnity Company. Appellant Reply Brief due by 2/10/2005
2/10/05	52	Appellant's REPLY BRIEF. Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
2/11/05	53	FIRST MEMORANDUM OF LAW in Opposition re: 16 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss. Originally filed in 1:04-cv-08094-DAB on Dec. 17, 2004.* Document filed by Onebeacon America Insurance Company. Filed In Associated Cases: 1:04-cv-08001-JGK, 1:04-cv-08048-JGK, 1:04-cv-08094-DAB, 1:04-cv-08441-JGK
3/6/06	59	TRANSCRIPT of proceedings held on 02/22/06 before Judge John G. Koeltl
3/17/06	60	TRANSCRIPT of proceedings held on 2/22/2006 before Judge John G. Koeltl

3/29/06	61	MEMORANDUM AND CPINION: The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss arcc denied. With respect to the merits of the various appeals, The Bankrupsy Court's findings and clarifying order are affirmed, except for the portions relating to the "gate keeping" provision. Thus, paragraph 9(c) of the clarifying order is vacated. (Signed by Judge John G. Koeltl on 3/28/06) (js,). Filed In Associated Cases: 1:04-cv-08001-JGK, 1:04-cv-08048-JGK, 1:04-cv-08094-JGK, 1:04-cv-08441-JGK
3/29/06		Transmission to Judgments and Orders Clerk. Transmitted re: 61 Memorandum & Opinion,,, to the Judgments and Orders Clerk. Filed In Associated Cases: 1:04-cv-08001-JGK, 1:04-cv-08048-JGK, 1:04-cv-08094-JGK, 1:04-cv-08441JGK
3/31/06	62	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated March 28, 2006, the motions to dismiss are denied; the Bankruptcy Court's Findings and Clarifying Order is affirmed, except for the portions relating to the "gate-keeping" provision, and thus paragraph 9(c) of

the Clarifying Order is vacated. (Signed by J. Michael McMahon, clerk on 3/31/06)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 1:04-cv-08048-JGK

Relevant Docket Entries

Date	No.	Description
10/13/04	1	NOTICE OF APPEAL FROM THE BANKRUPTCY COURT TO THE S.D.N.Y. from the Order of Judge Burton R. Lifland dated August 17, 2004. Bankruptcy Court Case Numbers: 82-B-11656 (BRL). Certified copies of file received.Document filed by Chubb Indemnity Insurance Company. Appellant Brief due by 10/28/2004
10/13/04	2	DESIGNATION OF BANKRUPTCY RECORD ON APPEAL re: 1 Bankruptcy Appeal,. Document filed by Appellant Chubb Indemnity Insurance Company
10/13/04	3	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travlers Indemnity Company

10/13/04	4	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Common Law Settlement Counsel
10/13/04	5	ADDENDUM TO COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travelers Indemnity Company
10/13/04	6	Bankruptcy Court Clerks Certificate of Record on Appeal
10/19/04	7	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as related to 04-cv-8001 and 04-cv-8094. Document filed by Chubb Indemnity Insurance Company
10/20/04	8	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as related to 04-cv-8001 (JGK)and 04-cv-8094 (KMW). Document filed by Statutory Direct Action Plaintiffs, Hawaii Plaintiffs
10/28/04	9	Appellant's BRIEF. Document filed by Chubb Indemnity Insurance Company. Appellee Brief due by 11/12/2004
11/16/04	12	MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss*. Document filed by Statutory Direct Action Plaintiffs

11/16/04	13	MEMORANDUM OF LAW in Support re: 12 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.* Document filed by Statutory Direct Action Plaintiffs
12/3/04		ORDER consolidating for all purposes 04 civ. 8001, 8048, 8094, 8441 as set forth in this document. (Original entry is docketed in 04 civ. 8001 as doc. #35). (Signed by Judge John G. Koeltl on 12/2/04)
12/17/04	20	Appellee's BRIEF. Document filed by Hawaii Plaintiffs, Statutory Direct Action Plaintiffs. Appellant Reply Brief due by 12/31/2004
3/29/06	23	MEMORANDUM AND OPINION: The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss aree denied. With respect to the merits of the various appeals, The Bankrupsy Court's findings and clarifying order are affirmed, except for the portions relating to the "gate keeping" provision. Thus, paragraph 9(c) of the clarifying order is vacated. (Signed by Judge John G. Koeltl on 3/28/06)
3/31/06	24	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated March 28,

		2006, the motions to dismiss are denied; the Bankruptcy Court's Findings and Clarifying Order is affirmed, except for the portions relating to the "gate-keeping" provision, and thus paragraph 9(c) of the Clarifying Order is vacated. (Signed by J. Michael McMahon, clerk on 3/31/06)
4/28/06	25	NOTICE OF APPEAL from 24 Clerk's Judgment, 23 Memorandum & Opinion,. Document filed by Chubb Indemnity Insurance Company. Filing fee $ 455.00, receipt number E 577850. ORIGINAL ENTERED ON 04CV8001, DOC #69

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 1:04-cv-08094-JGK

Relevant Docket Entries

Date	No.	Description
10/14/04	1	NOTICE OF APPEAL FROM THE BANKRUPTCY COURT TO THE S.D.N.Y. from the Order of Judge Burton R. Lifland dated August 17, 2004. Bankruptcy Court Case Numbers: 82-B-11656 (BRL). Certified copies of file received. Document filed by OneBeacon America Insurance Company. Appellant Brief due by 10/29/2004
10/14/04	2	DESIGNATION OF BANKRUPTCY RECORD ON APPEAL re: 1 Bankruptcy Appeal. Document filed by Appellant OneBeacon America Insurance Company
10/14/04	3	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travelers Indemity Company

10/14/04	4	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Common Law Settlement Counsel
10/14/04	5	ADDENDUM TO COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Travelers Indemity Company
10/14/04	6	Bankruptcy Court Clerks Certificate of Record on Appeal
10/19/04	8	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as Document filed by Onebeacon America Insurance Company
10/20/04	10	STATEMENT OF RELATEDNESS re: that this action be filed as related to 04-cv-8001 (JGK) and 04-cv-8048 (LAK). Document filed by Hawaii Plaintiffs, Statutory Direct Action Plaintiffs
10/29/04	11	Appellant's BRIEF. Document filed by Onebeacon America Insurance Company. Appellee Brief due by 11/15/2004
11/16/04	15	MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.* Document filed by Statutory Direct Action Plaintiffs
11/16/04	16	MEMORANDUM OF LAW in Support re: 15 MOTION to Dismiss

		Plaintiff Appellee's Notice of Motion To Dismiss.. Document filed by Statutory Direct Action Plaintiffs
12/3/04		ORDER consolidating for all purposes 04 civ. 8001, 8048, 8094, 8441 as set forth in this document. (Original entry is docketed in 04 civ. 8001 as doc. #35). (Signed by Judge John G. Koeltl on 12/2/04)
12/17/04	21	MEMORANDUM OF LAW in Opposition re: 15 MOTION to Dismiss *Plaintiff Appellee's Notice of Motion To Dismiss.*. Document filed by Onebeacon America Insurance Company
12/17/04	22	Appellee's BRIEF. Document filed by Hawaii Plaintiffs, Statutory Direct Action Plaintiffs. Appellant Reply Brief due by 12/31/2004
3/29/06	25	MEMORANDUM AND OPINION: The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss aree denied. With respect to the merits of the various appeals, The Bankrupsy Court's findings and clarifying order are affirmed, except for the portions relating to the "gate keeping" provision. Thus, paragraph 9 (c) of the clarifying order is

		vacated. (Signed by Judge John G. Koeltl on 3/28/06)
3/31/06	26	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated March 28, 2006, the motions to dismiss are denied; the Bankruptcy Court's Findings and Clarifying Order is affirmed, except for the portions relating to the "gate-keeping" provision, and thus paragraph 9 (c) of the Clarifying Order is vacated. (Signed by J. Michael McMahon, clerk on 3/31/06)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: JOHNS-MANVILLE CORPORATION, *et al.*

No. 1:04-cv-08441-JGK

Relevant Docket Entries

Date	No.	Description
10/27/04	1	NOTICE OF APPEAL FROM THE BANKRUPTCY COURT TO THE S.D.N.Y. from the Order of Judge Burton R. Lifland dated August 17, 2004. Bankruptcy Court Case Numbers: 82-B-11656 (BRL). Certified copies of file received. Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants. Appellant Brief due by 11/11/2004
10/27/04	2	AMENDED NOTICE OF APPEAL FROM THE BANKRUPTCY COURT TO THE S.D.N.Y. from the Order of Judge Burton R. Lifland dated August 17, 2004, amending 1 Bankruptcy Appeal. Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants. Appellant Brief due by 11/8/2004. Related

		document: 1 Bankruptcy Appeal, filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
10/27/04	3	DESIGNATION OF BANKRUPTCY RECORD ON APPEAL re: 1 Bankruptcy Appeal. Document filed by Appellants Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
10/27/04	4	AMENDED DESIGNATION OF BANKRUPTCY RECORD ON APPEAL re: 2 Amended Bankruptcy Appeal,. Document filed by Appellants Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
10/27/04	5	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellees Surety Company, Travelers Casualty, Travelers Indemnity Company, Travelers Property Casualty Corp.
10/27/04	6	COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellee Common Law Settlement Counsel
10/27/04	7	ADDENDUM TO COUNTER DESIGNATION OF BANKRUPTCY RECORD ON APPEAL Document filed by Appellees Surety Company, Travelers Casualty, Travelers Indemnity Company, Travelers Property Casualty Corp.

10/27/04	8	STATEMENT OF RELATEDNESS PURSUANT TO LOCAL RULE 1.6 re: that this action be filed as related to 04cv8001(JFK), 04cv8048(LAK), 04cv8094(KMW). Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
11/09/04	10	MOTION to Consolidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule.* Document filed by Travelers Casualty, Travelers Indemnity Company, Travelers Property Casualty Corp.
11/09/04	11	MEMORANDUM OF LAW in Support re: 10 MOTION to Consolidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule.*. Document filed by Travelers Casualty, Travelers Indemnity Company, Travelers Property Casualty Corp.
11/09/04	12	AFFIDAVIT of Andrew T. Frankel in Support re: 10 MOTION to Consolidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule.*. Document filed by Travelers Casualty, Travelers Indemnity Company, Travelers Property Casualty Corp.
11/12/04	13	Appellant's BRIEF. Document filed by Asbestos Personal Injury Plain-

		tiffs, Cascino Asbestos Claimants. Appellee Brief due by 11/29/2004
11/16/04	16	DECLARATION of Douglas T. Tabachnik and Sander L. Esserman in Opposition re: 10 MOTION to Con-solidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule.*. Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
11/17/04	18	RESPONSE in Opposition re: 10 MOTION to Consolidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule. FIRST SUPPLEMENT TO APPELLANTS OBJECTION TO MOTION TO CONSOLIDATE BANKRUPTCY APPEALS AND SET A UNIFORM BRIEFING SCHEDULE.* Document filed by Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants
11/19/04	21	REPLY to Response to Motion re: 10 MOTION to Consolidate Cases 04-cv-8001, 04-cv-8048, 04-cv-8094 *and 04-cv-8441 and Set A Uniform Briefing Schedule. Reply Memorandum in Further Support of Travelers Motion to Consolidate Bankruptcy Appeals and Set a Uniform Briefing Schedule.* Document filed by Travelers Casualty,

		Travelers Indemnity Company, Travelers Property Casualty Corp.
12/03/04		ORDER consolidating for all purposes 04 civ. 8001, 8048, 8094, 8441 as set forth in this document. (Original entry is docketed in 04 civ. 8001 as doc. #35). (Signed by Judge John G. Koeltl on 12/2/04)
12/17/04	24	Appellee's BRIEF. Document filed by Statutory Direct Action Plaintiffs, Hawaii Plaintiffs. Appellant Reply Brief due by 12/31/2004
03/29/06	27	MEMORANDUM AND OPINION: The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss aree denied.With respect to the merits of the various appeals, The Bankrupsy Court's findings and clarifying order are affirmed, except for the portions relating to the "gate keeping" provision. Thus, paragraph 9(c) of the clarifying order is vacated. (Signed by Judge John G. Koeltl on 3/28/06)
03/31/06	28	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated March 28, 2006, the motions to dismiss are denied; the Bankruptcy Court's Findings and Clarifying Order is

affirmed, except for the portions relating to the "gate-keeping" provision, and thus paragraph 9(c) of the Clarifying Order is vacated. (Signed by J. Michael McMahon, clerk on 3/31/06)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: JOHNS-MANVILLE CORPORATION, *et. al.*

Bankruptcy Petition No. 82-11656-brl

[Prior Entries Omitted]

Date	No.	Description
6/19/02	3412	Order to Show Cause for Temporary Restraining Order and Preliminary Injunction signed on 6/19/2002 at 2:25 p.m. With hearing to be held on 6/27/2002 at 10:00 AM at Courtroom 623 (BRL)
6/19/02	3413	Motion for Temporary Restraining Order *and Preliminary Injucnction (1 of 4 sets exhibits attached* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3414	(ENTERED IN ERROR) Motion for Temporary Restraining Order *and Preliminary Injunction (2 of 4 sets of exhibits to affidavit)* (related document(s) 3412) filed by Mark

		Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3415	Motion for Temporary Restraining Order *and Preliminary Injunction (3 of 4 sets of exhibits to affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3416	(ENTERED IN ERROR) Motion for Temporary Restraining Order *and Preliminary Injunction (2A of 4 sets of exhibits of affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3417	(ENTERED IN ERROR) Motion for Temporary Restraining Order *and Preliminary Injunction (3 of 4 sets of exhibits to affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3418	(ENTERED IN ERROR) Motion for Temporary Restraining Order *and Preliminary Injunction (4 of 4 sets of exhibits for Affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers

		Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3419	(ENTERED IN ERROR) Motion for Preliminary Injunction *and Prlim-inary Injunction (3A of 4 sets of exhibits attached to Affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/19/02	3420	(ENTERED IN ERROR) Motion for Preliminary Injunction *and Prlim-inary Injunction (4 o 4 sets of exhibits to Affidavit)* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/20/02	3421	Memorandum of Law *in Support of Order to Show Cause* (related to motions(s) 3413) (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/20/02	3422	Affidavit *of Barry Ostrager* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/21/02	3424	Letter *re Temporary Restraining Order and Preliminary Injunction obtained by Travelers Insurance*

		Co. filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust
7/2/02	3425	So Ordered Stipulation signed on 7/2/2002 RE: Preliminary Injunction with hearing to be held on 8/1/2002 at 10:00 AM at Courtroom 623 (BRL) Objections due by 7/10/2002
7/10/02	3426	Response *to Travelers' Request For Preliminary Injunction* filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust
7/10/02	3427	Response *to Order to Show Cause* (related document(s) 3412) filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/10/02	3428	Objection to Motion *(Objection to 6/19/02 Order to Show Cause for TRO and Preliminary Injunction)* (related to motions(s) 3399) (related document(s) 3412) filed by Christopher M. Placitella on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause
7/10/02	3430	Motion for Temporary Restraining Order *(Plaintiffs' Objection)* (related document(s) 3413) filed by Patrick N. Haines on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause

7/10/02	3432	Motion for Temporary Restraining Order *(Plaintiffs' Objection)* (related document(s) 3413) filed by Patrick N. Haines on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause
7/10/02	3433	Motion for Temporary Restraining Order *(Plaintiffs' Objection)* (related document(s) 3413) filed by Patrick N. Haines on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause
7/26/02	3439	Reply Memorandum of Law *in Further Support of Order to Show Cause* (related to motions(s) 3433) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/26/02	3440	Affidavit *of Andrew T. Frankel* (related to motions(s) 3433) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/29/02	3442	Affidavit *of Professor George L. Priest* (related document(s) 3412) filed by Mark Thompson on behalf of Travelers Indemnity Company

		and Travelers Casualty and Surety Company
7/31/02	3445	Motion to Strike *The Affidavit of Professor George L. Priest, etc.* (related document(s) 3413) filed by Christopher M. Placitella on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause. with hearing to be held on 8/1/2002 (check with court for location)
8/1/02	3446	Order signed on 8/1/2002, Referring Matter to Mediation and Appointing Mediator
8/7/02	3451	Conventional Filing *hearing held on August 1, 2002* filed by Doyle Reporting, Inc.
10/4/02	3468	Letter filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust
1/27/03	3473	Response *Memorandum by Lawrence Madeksho to Travelers Indemnity Company and Travelers Casualty and Surety Company 1/23/03 Supplemental Motion to Show Cause* filed by Eric W. Sleeper on behalf of Plaintiffs w/claims listed on Exhibit C to Travelers 1/23/03 OTSC
1/28/03	3474	Supplemental Order to Show Cause signed on 1/27/2003 (related document(s) 3412, 3446). RE: Preliminary Injunction

1/28/03	3475	Application/*Motion to Quash Hearing and Objections to Request for Show Cause Order* (related document(s)3474) filed by Eric Bogdan on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause
2/25/03	3478	Notice of Appeal *by Lawrence Madesksho and Eric Bogdan of Order Entered 1/27/03 granting TRO to Travelers* filed by Eric W. Sleeper on behalf of Plaintiffs w/claims listed on Exhibit C to Travelers 1/23/03 OTSC
3/6/03	3480	*Designation of Record on Appeal of Supplemental Order to Show Cause dated 1/27/03 [related to docket item 3478]* filed by Eric W. Sleeper on behalf of Plaintiffs w/claims listed on Exhibit C to Travelers 1/23/03 OTSC
3/6/03	3481	*Statement of Issues on Appeal of Supplemental Order to Show Cause dated 1/27/03 [related to docket entry 3478 and 3480]* filed by Eric W. Sleeper on behalf of Plaintiffs w/claims listed on Exhibit C to Travelers 1/23/03 OTSC
3/24/03	3486	Response *Designation of Additional Items To Be Included In Record On Appeal* (related document(s) 3478) filed by Mark Thompson on behalf of Travelers

		Indemnity Company and Travelers Casualty and Surety Company
3/26/03	3488	Motion to Dismiss Case (related document(s) 3478) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
3/26/03	3489	Motion to Dismiss Case (related document(s) 3478) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/1/03	3492	Conventional Filing *hearing held on March 26, 2003* filed by Doyle Reporting, Inc.
6/20/03	3498	Motion for Temporary Restraining Order (related document(s) 3412, 3474) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/23/03	3503	Opposition Brief (related document(s) 3498) filed by Bruce Carter on behalf of Ohio Common Law Plaintiffs
6/24/03	3501	Second Supplemental Order to Show Cause signed on 6/24/2003, Extending Preliminary Injunction (related document(s) 3498)
6/25/03	3504	Motion to Withdraw Document/ *Motion to Withdraw from Mediation* filed by Lawrence Madeksho

7/2/03	3505	Conventional Filing *hearing held on 6/24/2003* filed by Doyle Reporting, Inc.
7/2/03	3506	Notice of Appeal filed by Plaintiff listed on Ex D identified in the 6/23/03 order. Rec. No. 139928
7/18/03	3510	Designation of Contents (appellant). *of Record on Appeal* filed by Bruce Carter
7/18/03	3511	Statement of Issues filed by Bruce Carter
7/28/03	3512	Counter Designation (appellee) *of Additional Items To Be Included In The Record On Appeal* (related document(s)3508, 3511, 3506) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
8/19/03	3524	Response to Motion (related document(s) 3517) filed by Lawrence Madeksho on behalf of Texas Common Law Plaintiffs, Ohio Common Law Plaintiffs
9/2/03	3534	Notice of conventional filing hearing held on 8/27/2003 filed by Doyle Reporting ,Inc.
9/4/03	3533	Motion to Join *Lawrence Madesko and Eric Bogdan Motion to Withdraw from Mediation* (related doc-

		ument(s) 3504) filed by Eric W. Sleeper on behalf of Ohio Common Law Plaintiffs. with hearing to be held on 10/2/2003 at 10:00 AM at Courtroom 623 (BRL)
9/25/03	3539	*Motion for Status Conference* filed by Eric W. Sleeper on behalf of Plaintiffs w/ claims listed in Exhibit A to Court's 6/19/02 Order to Show Cause. (Attachments: # 1 Motion for Status Conference# 2 Order# 3 Certificate of Service)
10/2/03	3543	Response to Motion / *Hon. Mario M. Cuomo's Response to Motion of Texas Common Law Plaintiffs to Withdraw from Mediation* filed by Paul V. Shalhoub on behalf of Hon. Mario M. Cuomo
10/6/03	3545	Civil Cover Sheet *received from the US District Court, SDNY - In Re: Civil Case Number - 03CV7173 assigned to Judge Miriam Goldman Cedarbaum;* (related document(s) 3506) filed by Clerk's Office of the United States Bankruptcy Court
11/19/03	3548	Minute Order signed on 11/19/2003 Denying Motion to Disqualify the Mediator as per Record of Hearing (related document(s) 3504)
11/19/03	3549	Minute Order signed on 11/19/2003. RE: Restraining Order, as Modified by this Court Previously, Remains in Effect Until March 15,2004 Trial

		Date. Trial Date to be held on 3/15/2004 at 10:00 AM at Courtroom 623 (BRL)
11/21/03	3552	Notice of Conventional Filing hearing held on 11/19/2003 filed by Veritext Company
12/2/03	3550	Counter Designation (appellee) *(SUPPLEMENTAL DESIGNATION)* (related document(s) 3512) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
2/10/04	3713	Transcript *hearing held on 11/19/2003* filed by Veritext, LLC
3/24/04	3560	Scheduling Order signed on 3/24/2004 (A) Establishing Hearing on Motion to Approve Settlement of Statutory Direct Action Claims, and Certain Related Procedures, and (B) Approving Form and Manner of the Related Notices. Pre-Trial Conference to be held on 4/29/2004 at 10:00 AM and Hearing on the Statutory Settlement Motion to be held on 5/3/2004 at 10:00 AM at Courtroom 623 (BRL)
3/24/04	3562	Declaration *of David T. Austern, Esq. In Support of Joint Motion for Schedule and Notice Approval Order* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

3/26/04	3564	Notice of Hearing *of Motion of Travelers For an Order Interpreting and Enforcing the Confirmation Including the Insurance Settlement Order and Channeling Injunction* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company. with hearing to be held on 5/4/2004 at 10:00 AM at Courtroom 623 (BRL)
3/26/04	3565	Motion to Allow *Travelers For an Order Interpreting and Enforcing the Confirmation Including the Insurance Settlement Order and Channeling Injunction (Related to #3564)* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
3/29/04	3566	Motion to Approve Compromise *between Travelers and Certain Plaintiffs* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP. with hearing to be held on 5/3/2004 (check with court for location) Responses due by 4/29/2004
3/29/04	3567	Notice of Motion to Set Hearing *of Traverlers Motion to Approve Statutory Direct Action Settlement Agreement* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers

		Casualty and Surety Company. with hearing to be held on 5/3/2004 at 10:00 AM at Courtroom 623 (BRL)
3/29/04	3568	Motion to Approve *Statutory Direct Action Settlement Agreement* (related document(s)3567) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
3/30/04	3569	Amended Scheduling Order signed on 3/30/2004 (A) Establishing Hearing on Motion to Approve Settlement of Statutory Direct Action Claims, and Certain Related Procedures, and (B) Approving Form and Manner of the Related Notices (related document(s)3560)
3/30/04	3582	Notice on conventional filing hearing held on 3/15/04 3:05 p.m. filed by The Clerk's Office United States Bankruptcy Court
4/1/04	3570	Scheduling Order signed on 4/1/2004 Establishing (I) Hearing on Motion For The Enforcement Of Injunctions Contained In Confirmation Order And (II)Certain Related Procedures. ORDERED THAT a Pretrial Conference addressing the Hearing will be held on April 28, 2004 at 10:00 a.m. The Hearing on the Enforcement Moton will take

		place on May 4 and 5, 2004 at 10:00 a.m.
4/6/04	3577	Amended Scheduling Order signed on 4/6/2004 Establishing (I) Hearing on Motion For The Enforcement Of Injunctions Contained In Confirmation Order And(II)Certain Related Procedures. (related document(s)3570) with Pre-Trial Conference to be held on 4/28/2004 at 10:00 AM at Courtroom 623 (BRL)
4/9/04	3581	Memorandum of Law *in Support of Its Motion for an Order Interpreting and Enforcing the Confirmation Order Including the Insurance Settlement Order and Channeling Injunction* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/13/04	3584	Objection *to Motion* (related document(s)3578) filed by Alani Golanski on behalf of The Common-Law Plaintiffs
4/16/04	3586	Memorandum of Law *of Statutory Direct Action Plaintiffs in Support of their Motion Approving a Settlement Agreement with Travelers* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP

4/16/04	3587	Memorandum of Law *In Support of Its Motion for An Order Approving the Statutory Settlement Motion* (related document(s)3568) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/21/04	3590	Motion to Extend Time *for Discovery Deadlines and the Date for Hearing of the Motions of Certain Insurers - Including Travelers, Century, and One Beacon - For Orders Interpreting and Enforcing the Confirmation Order* filed by Alani Golanski on behalf of The Common-Law Plaintiffs
4/23/04	3588	Joint Objection to Motion *Joint Objection of the Selected Counsel for the Beneficiaries of the Manville Trust and the legal Representative of the Future Claimants to Proposed Settlement of Statutory Direct Actions and Proposed Clarifying Order* filed by Elihu Inselbuch on behalf of The Manville Trust
4/23/04	3589	Response to Motion *For Orders Interpreting and Enforcing the Confirmation Order* filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust. with hearing to be held on 5/3/2004 at 10:00 AM at Courtroom 623 (BRL)

4/23/04	3591	Statement *Common Law Plaintiffs' Witness and Exhibit Lists* filed by Deirdre Woulfe Pacheco on behalf of The Common-Law Plaintiffs
4/26/04	3595	Opposition *of Travelers to the Common Law Plaintiffs' Motion to Extend the Discovery Deadlines and Postpone the Hearing* (related document(s)3590) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/27/04	3598	Notice of Hearing *of Travlelers' Motion to Strike Common Law Plaintiffs' Witness and Exhibit Lists* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/27/04	3599	Motion to Strike *Common Law Plaintiffs' Witness and Exhibit Lists* (related document(s)3598) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
4/27/04	3601	Statement *Re: Status Conference of Travelers for the Hearing on Motion for an Order Interpreting and Enforcing the Confirmation Order Including the Insurance Settlement Order and Channeling*

Injunction filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company. with hearing to be held on 4/28/2004 at 10:00 AM at Courtroom 623 (BRL)

4/27/04 3604 Statement *Status Conference Statement of Selected Counsel for the Beneficiaries of the Manville Trust for an Order Interpreting and Enforcing the Confirmation Order Including the Insurance Settlement Order and Channeling Injunction* filed by Elihu Inselbuch on behalf of The Manville Trust

4/28/04 3607 Objection to Motion *to Approve Statutory Direct Action Settlement Agreement* (related document(s) 3568) filed by Clifton S. Elgarten on behalf of Century Indemnity Company. with hearing to be held on 5/3/2004 at 10:00 AM at Courtroom 623 (BRL)

4/29/04 3609 Response to Motion *of Travelers to Approve the Statutory Direct Action Settlement Agreement* filed by John P. Foudy on behalf of One-Beacon America Insurance Company, f/k/a Commercial Union Insurance Company

4/29/04 3610 Objection */Joinder of Continental Casualty Company in Century Indemnity Company's Objections*

		to Statutory Direct Action Settlement Agreement filed by Adam Ford on behalf of Continental Casualty Company
4/29/04	3611	Motion to Strike *Notice of Motion and Motion In Limine of Selected Counsel for the Beneficiaries of the Manville Trust for an Order Excluding Expert Report and Testimony of Professor George Priest* filed by Elihu Inselbuch on behalf of The Manville Trust
4/29/04	3612	Motion to Strike *Memorandum in Support of Motion In Limine of Selected Counsel for the Beneficiaries of the Manville Trust for an Order Excluding Expert Report and Testimony of Professor George Priest* filed by Elihu Inselbuch on behalf of The Manville Trust
5/3/04	3614	Objection *to confirmation of amended plan, statutory settlement motion or entry of clarifying order* filed by Diana Torrejon
5/3/04	3615	Notice of objection to confirmation of amended plan statuary settlement motion , or entry of clarifying order filed by Diana Torrejon
5/4/04	3617	Notice of Conventional Filing hearing held on 4/28/04 Re: Petrial Conference filed by A Veritext Company

5/4/04	3618	Notice of Adoption by The Ohio Common Law Plaintiff of Joint Objection of Selected Counsel for the Beneficiaries of the Manville Trust and the Legal Representative of the Future Claimants to Proposed Settlement of Statutory Direct Actions and Proposed Clarifying Order filed by Alani Golanski on behalf of The Common Law Plaintiffs. (Ho, Amanda) Modified on 5/17/2004
5/4/04	3619	Notice of Adoption by The Common Law Plaintiffs of the Moiton in Limine of Selected Counsel for the Beneficiaries of the Manville Trust for an Order Excluding Expert Report and Testimony of Professor George Priest
5/10/04	3621	Notice of Conventional filing hearing held on 5/5/03 Re: Travelers motion to approve statutory direct action settlement; 9019 between Travelers and certain plaintiffs filed by The Clerk's Office, US Bankruptcy Court, SDNY
5/17/04	3622	Motion to see if the Court have approved settlement for the asbestos clients, the three hundred & sixty million dollars filed by Rev. Melvin H. Tibbit, Sr.

5/19/04	3623	Notice of Withdrawal *of objection to proposed settlement of statutory direct actions* filed by Alani Golanski on behalf of Ohio Common Law Plaintiffs
5/24/04	3624	Amended Scheduling Order signed on 5/24/2004 (a) Establishing Hearing on Motion to Approve Settlement of Common Law Direct Action Claims, and Certain Related Procedures, and (b) Approving Form and Manner of the Related Notices. With hearing to be held on 7/6/2004 at 10:00 AM at Courtroom 623 (BRL)
5/27/04	3626	Notice of Conventional Filing hearing held on 5/24/04 10:20 a.m. filed by the Clerk's Office United States Bankruptcy Court SDNY
5/28/04	3627	Motion to Approve *the Hawaii Settlement Agreement between Travelers and Certain Plaintiffs* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP. with hearing to be held on 7/6/2004 (check with court for location) Responses due by 6/28/2004
6/4/04	3628	Scheduling Order signed on 6/3/2004 (A) Establishing (I) Hearing on Motion to Approve Settlement of Hawaii Direct Action Claims, and (II) Certain Related Procedures, and (B) Approving Form and Manner of

		the Related Notices; Pretrial Conference will be held on 6/30/04 at 10:00 a.m. Hawaii Settlement Motion with hearing to be held on 7/6/2004 at 10:00 AM at Courtroom 623 (BRL)
6/7/04	3629	Memorandum of Law *of the Hawaii Plaintiffs In Support of Their Motion Approving the Hawaii Settlement Agreement with Travelers* (related document(s) 3627) filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
6/7/04	3630	Notice of Motion to Set Hearing *of Motion to Approve the Common Law Direct Action Settlement Agreement* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company. with hearing to be held on 7/6/2004 at 10:00 AM at Courtroom 623 (BRL)
6/7/04	3631	Notice of Hearing *Of Travelers Motion to Approve the Common Law Direct Action Settlement Agreement* (related document(s) 3630) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/7/04	3632	Letter *Travelers Witness List for the Joint Hearing on Motions to : (I) Approve Settlement of Statu-*

		tory Direct Claims and Entry of Clarifying Order; and (II) Approve Settlement of Common Law Direct Action Claims and Entry of Clarifying Order; and (III) Approve Hawaii Direct Action Settlement Agreement filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/7/04	3633	Notice of Motion to Set Hearing *of Motion to Approve the Hawaii Direct Action Settlement Agreement* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/7/04	3634	Letter *EXHIBIT LIST OF TRAVELERS FOR THE JOINT HEARING ON MOTIONS TO: (I) APPROVE SETTLEMENT OF STATUTORY DIRECT ACTION CLAIMS AND ENTRY OF CLARIFYING ORDER; AND (II) APPROVE SETTLEMENT OF COMMON LAW DIRECT ACTION CLAIMS AND ENTRY OF CLARIFYING ORDER* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
6/9/04	3635	Second Amended Scheduling Order signed on 6/9/2004 (a) Establishing Hearing on Motion to Approve Settlement of Common Law Direct

Action Claims, and Certain Related Procedures, and (b) Approving Form and Manner of the Related Notices (related document(s)3624). With Pre-trial Conference to be held on 6/30/2004 at 10:00 AM at Courtroom 623 (BRL)

6/10/04 3636 Motion to Approve *the Common Law Direct Action Settlement Agreement* (related document(s) 3630, 3631) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

6/10/04 3637 Motion to Approve *the Hawaii Direct Action Settlement Agreement* (related document(s)3633) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

6/22/04 3755 Transcript *hearing held on March 15, 2004, 3:05 p.m. Re: Injunction extension Dan MacLeheny* filed by Veritext, LLC

6/24/04 3647 Letter *Concerning Travelers Settlement Matters Set For Hearing On July 6, 2004* filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust

6/25/04 3650 Letter *Re: Aetna, Inc. is no longer a party to this action* filed by

		Michael D. Lorensen on behalf of Aetna, Inc.
6/25/04	3652	Response to Motion (related document(s)3636) filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
6/28/04	3658	Objection *Supplemental Objection of Continental Casualty Company to Travelers' Motion to Approve the Statutory Direct Action Settlement* filed by Adam Ford on behalf of Continental Casualty Company
6/28/04	3659	Objection *of Continental Casualty Company to Travelers' Motion to Approve the Common Law Direct Action Settlement and the Hawaii Settlement Agreement* filed by Adam Ford on behalf of Continental Casualty Company
6/28/04	3660	Objection filed by Lance Roger Spodek on behalf of Luther Jewell. with hearing to be held on 6/30/2004 at 10:00 AM at Courtroom 623 (BRL)
6/28/04	3662	Objection *of Century Indemnity Company to Statutory Direct Action, Common Law Direct Action and Hawaii Direct Action Settlement Agreements* filed by Clifton S. Elgarten on behalf of Century Indemnity Company. with

		hearing to be held on 7/6/2004 at 10:00 AM at Courtroom 623 (BRL)
6/28/04	3664	Objection to Motion *Limited Objection to Travelers Motion to Approve the Common Law Direct Action Settlement Agreement* (related document(s) 3636) filed by Neal D. Colton on behalf of Chubb Indemnity Company
6/28/04	3665	Objection *Limited Objection of the Statutory Direct Action Plaintiffs to Travelers' Motion to Approve the Common Law Direct Action Settlement Agreement* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP. with hearing to be held on 7/6/2004 (check with court for location)
6/28/04	3666	Objection to Motion *TRAVELERS MOTION TO APPROVE THE COMMON LAW DIRECT ACTION SETTLEMENT AGREEMENT* (related document(s) 3636) filed by Douglas T. Tabachnik on behalf of Vernon Warnell, Robert Alvin Griffin, General Lee Cole, Lee Fletcher Anthony, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers. with hearing to be held on 7/6/2004 at 10:00 AM at Courtroom 623 (BRL)

6/28/04	3669	Objection *of Selected Counsel for the Beneficiaries of the Manville Trust to Proposed Hawaii Direct Action Settlement Agreement Settlement and Proposed Clarifying Order* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
6/28/04	3670	Objection *of Selected Counsel for the Beneficiaries of the Manville Trust to Proposed Settlement of Common Law Actions and Proposed Clarifying Order* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
6/28/04	3671	Objection *Renewed Objection of Selected Counsel for the Beneficiaries of the Manville Trust to Proposed Statutory Direct Action Settlement and Proposed Clarifying Order* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
6/28/04	3672	Letter *Motion in Limine of Selected Counsel for the Beneficiaries of the Manville Trust for an Order Excluding the Expert Reports and Testimony of Professor George Priest* filed by Elihu Inselbuch on behalf of Beneficia-

		ries of the Manville Personal Injury Settlement Trust
6/28/04	3673	Letter *Exhibit and Witness List of Selected Counsel for the Beneficiaries of the Manville Trust* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
6/28/04	3675	Amended Response to Motion *to Approve the Common Law Direct Settlement Agreement* filed by Michael Cascino on behalf of John O. Noland Jr.
6/28/04	3677	Objection *to Travelers Common Law Direct Action Settlement Agreement* filed by Alan Kellman on behalf of Asbestosis Claimants
6/28/04	3678	Objection *and Response to Travelers' Motion to Approve Settlement Agreement* filed by James Bradley Mortensen on behalf of OneBeacon America Insurance Company, f/k/a Commercial Union Insurance Company
6/28/04	3694	Objection to Motion *to Approve The Common Law Direct Action Settlement Agreement* filed by Douglas T. Tabachnik on behalf of Vernon Warnell, Robert Alvin Griffin, General Lee Cole, Lee Fletcher Anthony, Pearlie Bailey, Shirley Melvin

6/29/04	3681	Statement *Re: Status Conference Statement of Travelers for the July 6 and 7 Hearing on Travelers Motion to Approve Settlement of Certain Direct Action Claims* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3684	Response *TRAVELERS OMNIBUS REPLY BRIEF IN FURTHER SUPPORT OF ITS PENDING MOTIONS TO APPROVE SETTLEMENTS OF (1) STATUTORY DIRECT ACTION SETTLEMENTS (2) COMMON LAW DIRECT ACTION CLAIMS AND (3) HAWAII DIRECT ACTION CLAIMS AND FOR ENRTY OF CLARIFYING ORDER* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3685	Declaration *OF KATHLEEN MUNROE* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3686	Declaration *of Frederick Dunbar* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

7/1/04	3687	Declaration *of David T. Austern* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3688	Declaration *of David T. Austern* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3689	Declaration *of Jeanne C. Finegan, APR* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3690	Declaration *of Larry Laskiewicz* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3691	Declaration *of James R. Prutsman* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3692	Declaration *of Albert H. Parnell, Esq.* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/1/04	3693	Declaration *of George Priest* filed by Mark Thompson on behalf of

		Travelers Indemnity Company and Travelers Casualty and Surety Company
7/2/04	3695	*AMENDED EXHIBIT LIST OF TRAVELERS FOR THE JOINT HEARING ON MOTIONS TO: (I) APPROVE SETTLEMENT OF STATUTORY DIRECT ACTION CLAIMS; (II) APPROVE SETTLEMENT OF COMMON LAW DIRECT ACTION CLAIMS; (III) APPROVE HAWAII DIRECT ACTION SETTLEMENT AGREEMENT; AND (IV) ENTRY OF CLARIFYING ORDER* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
7/2/04	3696	*Motion in Limine* filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
7/2/04	3697	Mediator's Final Report Settled filed by Paul V. Shalhoub on behalf of Hon. Mario M. Cuomo
7/2/04	3703	Response *to Objections to Travelers Motion to Approve The Common Law Direct Action Settlement Agreement* (related document(s) 3636) filed by Alani Golanski on behalf of Settlement Counsel
7/14/04	3707	Letter *to the Honorable Burton J. Lifland* filed by Mark Thompson on behalf of Travelers Indemnity Com-

		pany and Travelers Casualty and Surety Company
7/15/04	3708	Findings of Fact and Conclusions of Law. *in Support of Chubb's Limited Objection to Travelers Motion to Approve the Common Law Direct Action Settlement Agreement* filed by Neal D. Colton on behalf of Chubb Indemnity Company
7/15/04	3709	Findings of Fact and Conclusions of Law. *Century Indemnity Company's Proposed Findings of Fact and Conclusions of Law in Support of its Objections to Statutory, Common Law, and Hawaii Direct Action Settlement Agreements* filed by Clifton S. Elgarten on behalf of Century Indemnity Company
7/15/04	3711	Findings of Fact and Conclusions of Law. *Proposed by Continental Casualty Company* filed by Adam Ford on behalf of Continental Casualty Company
7/15/04	3714	Findings of Fact and Conclusions of Law. *Cascino Asbestos Claimants, Including Andrew Hart, Proposed Findings of Fact and Conclusions of Law In Opposition to Travelers' Motion to Approve the Common Law Direct Action Settlement Agreement* filed by Michael Cas-

		cino on behalf of Various Asbestos Personal Injury Claimants
7/15/04	3715	Letter *Motion to Reconsider Exclusion of Witnesses* filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
7/15/04	3716	*Motion to Offer Proof Pursuant to Rule 1 and 103* filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
7/15/04	3718	Findings of Fact and Conclusions of Law. *With Regard to Request to Clarify Orders* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/15/04	3719	Findings of Fact and Conclusions of Law. *With Regard to Request to Approve Common Law Settlement* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/15/04	3720	Findings of Fact and Conclusions of Law. *With Regard to Request to Approve Statutory and Hawaii Settlements* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/15/04	3721	Letter *to the Honorable Burton J. Lifland Regarding Proposed Findings and Conclusions* filed by Elihu Inselbuch on behalf of Bene-

		ficiaries of the Manville Personal Injury Settlement Trust
7/15/04	3722	Findings of Fact and Conclusions of Law. *of the Statutory Direct Action Plaintiffs and the Hawaii Plaintiffs with regard to the Statutory and Hawaii Settlements* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
7/15/04	3723	Findings of Fact and Conclusions of Law. *of the Statutory Direct Action Plaintiffs with regard to the Common Law Settlement* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
7/15/04	3724	Findings of Fact and Conclusions of Law. *of Barbara A. Prater, Individually and as Personal Representative of the Heirs and Estate of James Prater* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
7/15/04	3725	Findings of Fact and Conclusions of Law. *REGARDING TRAVELERS MOTIONS FOR APPROVAL OF CERTAIN SETTLEMENT AGREEMENTS AND FOR ENTRY OF A CLARIFYING ORDER* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

7/15/04	3730	Notice of conventional filing hearing held on July 6, 2004 filed by The Clerk's Office United States Bankruptcy Court
7/15/04	3735	Findings of Fact and Conclusions of Law. filed by James Bradley Mortensen on behalf of OneBeacon America Insurance Company, f/k/a Commercial Union Insurance Company
7/15/04	3736	Memorandum of Law */Post - Hearing Memorandum of Law in support of Onebeacon Objections to Travelers' Motion to Enforce Hawaiian Direct Action Settlement, the Statutory Direct Action Settlement and Common Law Direct Action Settlement and in further support of Onebeacon's Findings of Fact and Conclusions of Law* filed by James Bradley Mortensen on behalf of OneBeacon America Insurance Company, f/k/a Commercial Union Insurance Company
7/19/04	3726	Letter *to the Honorable Burton R. Lifland* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

7/19/04	3727	Memorandum of Law *of the Statutory Direct Action Plaintiffs and the Hawaii Plaintiffs in Support of Separate Orders Approving the Statutory Direct Action Settlement, the Hawaii Settlement and the Common Law Settlement* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
7/20/04	3728	Letter *to the Honorable Burton R. Lifland* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/20/04	3729	Letter *Re Proposed Orders In Travelers' Settlements* filed by David T. Austern on behalf of Trustees of The Manville Personal Injury Settlement Trust
7/22/04	3732	Response *Reply to Statutory Direct Action Plaintiffs' and Hawaii Plaintiffs' Memorandum of Law* (related document(s)3727) filed by Karen Giannelli on behalf of Lawrence Madeksho and Bruce Carter, Counsel for Ohio and Texas Common Law Plaintiffs
7/22/04	3733	Response *Omnibus Reply and Limited Objection to Certain Proposed Findings of Fact and Conclusions of Law* (related document(s) 3716, 3718, 3719, 3720, 3708, 3709,

3725, 3714) filed by Karen Giannelli on behalf of Lawrence Madeksho and Bruce Carter, Counsel for Ohio and Texas Common Law Plaintiffs

7/22/04 3734 Response *Travelers Post-Trial Reply Brief In Further Support Of Its Proposed Findings Of Fact And Conclusions Of Law And In Opposition To Statutory Direct Action Plaintiffs? And Hawaii Direct Action Plaintiffs? Memorandum Of Law In Support Of Separate Orders* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

7/23/04 3737 Opposition *of TravelersTo The Cascino Asbestos Claimants Motion To Reconsider Exclusion Of Witnesses And Motion To Offer Proof* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company

7/26/04 3739 Objection *TO AND MOTION TO STRIKE LATE FILED ?SUPPLEMENTAL AFFIDAVIT OF BRUCE CARTER IN SUPPORT OF COMMON LAW SETTLEMENT?* (related document(s) 3733) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bai-

		ley, Shirley Melvin for the Estate of Joyce Myers, Vernon Warnell
7/27/04	3740	Response to Motion *Response of the Selected Counsel for the Beneficiaries and the Legal Representative to Travelers' Post-Trial Reply Brief in Further Support of its Proposed Findings of Fact and Conclusions of Law* filed by Elihu Inselbuch on behalf of Beneficiaries of the Manville Personal Injury Settlement Trust
7/28/04	3741	Reply to Motion *Cascino Asbestos Claimants, Including Andrew Hart, Reply to Travelers Response to Cascino Asbestos Claimants Motion Pursuant to Federal Rule 1 of Civil Procedures and Federal Rule 103 of Evidence* filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
7/28/04	3742	Reply to Motion *Reply to Travelers Opposition to Motion to Reconsider Exclusion of Witnesses* filed by Michael Cascino on behalf of Various Asbestos Personal Injury Claimants
7/29/04	3743	Statement *IN SUPPORT OF TIIE CASCINO ASBESTOS CLAIMANTS? MOTION TO OFFER PROOF* (related document(s)3716) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee

		Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Vernon Warnell
8/4/04	3811	Transcript *hearing date: 5/5/03 Re: Travelers motion to approve statutory direct action settlement agreement; 9019 between Travelers and certain plaintiffs* filed by Veritext, LLC
8/4/04	3812	Transcript *hearing date: 4/28/04 Re: Pretrial Conference* filed by Veritext, LLC
8/4/04	3813	Transcript *hearing date: 4/29/04 Re: Pretrial Conference* filed by Veritext, LLC
8/4/04	3814	Transcript *hearing date: 5/24/04 10:20 am Re: Adj. from: 5/4/04 Century Indemnity Co. supp mtn to enforce injunction; Adj from 5/3/04 Pre-Trial Conference. Adj from 5/3/04 Travelers mtn to approve statutory direct action settlement agreement. Adj from 5/3/04 9019 btwn Travelers and Certain Plaintiffs* filed by Veritext, LLC
8/16/04	3746	Letter *to Hon. Burton R. Lifland* filed by Bonnie Steingart on behalf of Fried, Frank, Harris, Shriver & Jacobson LLP
8/16/04	3747	Letter *to Hon. Burton R. Lifland* filed by Bonnie Steingart on behalf

		of Fried, Frank, Harris, Shriver & Jacobson LLP
8/16/04	3748	Letter *to The Honorable Burton R. Lifland* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
8/17/04	3749	Minute Order signed on 8/17/2004. RE: Section 105 Conference (Status Pending Settlements and Objections)
8/17/04	3750	Findings of Fact and Conclusions of Law signed on 8/17/2004 Regarding Travelers Motions for Approval of Certain Settlement Agreements and for Entry of a Clarifying Order
8/17/04	3751	Order signed on 8/17/2004 at 4:50PM Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction (related document(s) 3750)
8/17/04	3752	So Ordered Stipulation signed on 8/17/2004. RE: Hawaii Direct Action Settlement and Statutory Direct Action Settlement
8/17/04	3753	So Ordered Stipulation signed on 8/17/2004 With Century Indemnity Company. RE: Common Law Direct Action Settlement

8/19/04	3756	Notice of Conventional Filing hearing held on August 17, 2004 filed by Clerk's Office United States Bankruptcy Court
8/27/04	3757	Notice of Appeal filed by Neal D. Colton on behalf of Chubb Indemnity Company
8/27/04	3758	Motion for Reargument FRCP 59 (related document(s)3750, 3751) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell. with hearing to be held on 10/6/2004 at 10:00 AM at Courtroom 623 (BRL)
8/27/04	3759	Notice of Appeal filed by Frederick C. Schafrick on behalf of Continental Casualty Company. Filing fee collected, receipt #151793
8/27/04	3760	Notice of Appeal filed by Bradley J. Mortensen on behalf of OneBeacon America Insurance Company. Filing fee collected, receipt #151796
9/2/04	3761	Notice of Appeal (related document(s)3750, 3751) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey

		for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell
9/7/04	3763	Designation of Contents (appellant)., Statement of Issues (related document(s)3757) filed by Neal D. Colton on behalf of Chubb Indemnity Company
9/7/04	3764	Statement of Issues *on Appeal* filed by Adam Ford on behalf of Continental Casualty Company
9/08/04	3767	Response to Motion *Re: Response to Rule 59 Motion* (related document(s)3758) filed by Karen Giannelli on behalf of Settlement Counsel
9/10/04	3769	Designation of Contents (appellant). (related document(s)3761) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell
9/10/04	3770	Statement of Issues (related document(s) 3769, 3761) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie

		Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell
9/14/04	3772	Designation of Contents (appellant). (related document(s) 3760) filed by Bradley J. Mortensen on behalf of OneBeacon America Insurance Company, OneBeacon America Insurance Company, f/k/a Commercial Union Insurance Company
9/14/04	3773	Statement of Issues (related document(s) 3760) filed by Bradley J. Mortensen on behalf of OneBeacon America Insurance Company, OneBeacon America Insurance Company, f/k/a Commercial Union Insurance Company
9/16/04	3775	Decision and Order signed on 9/16/2004 DENYING Claimants' Motion (related document(s) 3758)
9/17/04	3776	Counter Designation (appellee) *and Statement* (related document(s) 3759, 3760, 3761, 3757) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
9/20/04	3777	Transmittal of Addendum-Appeal Record *Electronic Submission of*

Items Designated for the Record on Appeal by Continental Casualty Company filed by Adam Ford on behalf of Continental Casualty Company

9/24/04 3779 Amended Notice of Appeal (related document(s)3761) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell

9/24/04 3780 Designation of Contents (appellant). *FIRST AMENDED DESIGNATION OF RECORD ON APPEAL* (related document(s)3769, 3779) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell

9/24/04 3781 Statement of Issues *FIRST AMENDED STATEMENT OF ISSUES ON APPEAL* (related document(s) 3779, 3770, 3780) filed by Douglas T. Tabachnik on behalf of Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin, Pearlie

		Bailey for the Estate of James Bailey, Shirley Melvin for the Estate of Joyce Myers, Various Asbestos Personal Injury Claimants, Vernon Warnell
10/1/04	3783	Affidavit/*Certification* filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
10/1/04	3784	Counter Designation (appellee) *Common Law Settlement Counsels' Counter-Designation for the Record on Appeal* filed by Karen Giannelli on behalf of The Common Law Plaintiffs
10/5/04	3785	Counter Designation (appellee) *(ADDENDUM)* (related document(s) 3776) filed by Mark Thompson on behalf of Travelers Indemnity Company and Travelers Casualty and Surety Company
10/5/04	3817	Transcript *hearing held on 6/30/04 Re: Common Law Settlement Motion* filed by Veritext, LLC
10/5/04	3818	Transcript *hearing held on 7/6/04* filed by Veritext, LLC
11/5/04	3819	Transcript *hearing held on 8/17/04 Re: Status conference regarding distribution procedures for common direct action settlement fund* filed by Veritext, LLC

PETITIONER'S BRIEF

8606 120 No. 08-295 (7)

FILED
JAN 2 8 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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BOTH

HARPER

QUESTION PRESENTED

In 1986, the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.) confirmed a landmark plan of reorganization for Johns-Manville Corporation that channeled hundreds of thousands of asbestos-related personal injury claims into a special trust fund for the benefit of injured workers and their families. The linchpin of this reorganization was the contribution of hundreds of millions of dollars by Petitioners and other insurers into a trust for payment of asbestos claims in exchange for protection from future lawsuits against the insurers, all of which was intended to provide Petitioners with full and final protection from suits relating to, arising from or in connection with Petitioners' insurance relationship with Manville. The U.S. Court of Appeals for the Second Circuit affirmed the Manville confirmation order in full on direct review in 1988.

The U.S. Congress subsequently ratified the Manville confirmation order (*see* 11 U.S.C. § 524(h)) and used it as a model for Section 524(g) of the Bankruptcy Code. In the decades following the entry of the final judgment affirming the Manville plan of reorganization, and in reliance on the protections enacted by Congress, *tens of billions of dollars* have been paid into "524(g) trusts" for the benefit of hundreds of thousands of asbestos claimants around the country. In 2002, Petitioners sought to enforce the Manville court's orders when certain asbestos claimants tried to evade the confirmation order by suing Travelers directly in so-called "direct actions." The bankruptcy court that fashioned the Manville plan of reorganization enjoined these suits, holding

that they were proscribed by the 1986 confirmation order. The district court affirmed the bankruptcy court's decision, but in February 2008, more than two decades after the original orders became final, a different panel of the Second Circuit held that the bankruptcy court lacked authority in 1986 to enter a confirmation order that extended beyond the "res" of the debtor's estate, which it defined as insurance policy proceeds.

The question presented, therefore, is:

Whether the court of appeals erred in categorically holding that bankruptcy courts do not have jurisdiction to enter confirmation orders that extend beyond the "res" of a debtor's estate, despite this Court's ruling that "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res," *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), and whether the court of appeals compounded this error by:

(a) failing to apply as written a final confirmation order and the federal statute (11 U.S.C. §§ 524(g) & (h)) codifying that order, which has been the cornerstone of nearly all asbestos-related bankruptcies since the statute's enactment;

(b) failing to give effect to the Supremacy Clause and holdings of this Court that federal bankruptcy relief cannot be overridden by rights alleged to have been created under state law; and

(c) failing to enforce on collateral review the same final bankruptcy confirmation order that it previously affirmed in full twenty-one years ago.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in No. 08-295 are The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp. The Petitioners in No. 08-307 are Common Law Settlement Counsel.

In addition to Petitioners, other appellees below were Statutory Settlement Counsel and Hawaii Settlement Counsel.

The Respondents (appellants below) are Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony, Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs, and Cascino Asbestos Claimants.

The Debtors in the Chapter 11 proceedings from which this case arises are Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation, and Manville Service Corporation), Manville International Canada, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl Ranch Corporation, Johns-Manville Idaho, Inc., Manville Canada Service, Inc., and Sunbelt Contractors, Inc.

RULE 29.6 DISCLOSURE

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

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In The Supreme Court of the United States

THE TRAVELERS INDEMNITY CO., ET AL., PETITIONERS

v.

PEARLIE BAILEY, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Second Circuit's opinion (App. 1a) is reported at 517 F.3d 52. The district court's opinion (App. 37a) is reported at 340 B.R. 49. The bankruptcy court's order (App. 86a) and findings of fact and conclusions of law (App. 101a) are not officially reported, but are available at 2004 WL 1876046 and 2004 Bankr. Lexis 2519.

The bankruptcy court's original insurance settlement order (App. 210a) and confirmation order (App. 261a) are unreported, but were immediately preceded by an opinion (App. 297a) reported at 68 B.R. 618. The district court's opinion affirming the original insurance settlement order and confirmation order (App. 204a) is reported at 78 B.R. 407. The

Second Circuit's opinion affirming the original insurance settlement order and confirmation order (App. 188a) is reported at 837 F.2d 89.

JURISDICTION

The court of appeals entered its judgment on February 15, 2008 (App. 463a), and denied a timely petition for rehearing and/or rehearing *en banc* on May 8, 2008 (App. 457a). On July 22, 2008, Justice Ginsburg extended the time within which to file a petition for certiorari to and including September 5, 2008, and the petition was filed September 4, 2008. Certiorari was granted on December 12, 2008, and the Court consolidated this case with *Common Law Settlement Counsel* v. *Pearlie Bailey, et al.*, Case No. 08-307 The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 4 of the U.S. Constitution provides that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

Article VI, Clause 2 of the U.S. Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 105(a) of the Bankruptcy Code provides, in pertinent part, that bankruptcy courts "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Section 524(e) of the Bankruptcy Code provides, in pertinent part, that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

Section 524(g)(4)(A)(ii) of the Bankruptcy Code provides that in asbestos-related bankruptcies, "[n]otwithstanding the provisions of section 524(e)," a bankruptcy court may bar "any action directed against a third party who . . . is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party."

Section 524(h)(1) of the Bankruptcy Code provides, in pertinent part, that "if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered . . . to satisfy subsection (g)(4)(A)(ii) . . . ."

The complete text of Section 524 of the Bankruptcy Code is set forth at App. 466a.[1]

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[1] All citations to "App." refer to the appendix accompanying the petition for certiorari in No. 08-295, while citations to "2d Cir. App." refer to the joint appendix used in the Second Circuit.

STATEMENT OF THE CASE

This is an appeal from a 2004 bankruptcy court order enforcing the 1986 confirmation order in the Johns-Manville bankruptcy. The order on appeal is supported by sixty pages of detailed factual findings (App. 101a–159a), entered after a contested evidentiary hearing at which the bankruptcy court heard testimony from numerous witnesses, both on direct and cross-examination, and received hundreds of exhibits into evidence. No party challenged any of these findings of fact in the appellate proceedings below. To the contrary, both the district court and the court of appeals canvassed the record and "embraced the bankruptcy court's factual findings" (App. 32a), finding them "extensive" (App. 14a, 33a), "persuasive" (App. 66a) and "unrebutted" (App. 66a).

The 1986 Manville confirmation order prohibits "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" the insurance policies that Travelers issued Manville. (App. 274a–275a, 439a). The Second Circuit affirmed the confirmation order in full on direct appeal twenty-one years ago. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) (App. 188a–203a). Here, the bankruptcy court made a factual finding (unchallenged, amply supported by the record, and adopted by the Second Circuit) that the asbestos plaintiffs' bar brought certain "direct action" lawsuits against Travelers that were indirect attempts to hold Travelers liable on account of its insurance relationship with Manville, in violation of the 1986 Manville confirmation order.

In 2008, on appeal from the enforcement proceedings, the Second Circuit accepted the bankruptcy court's factual finding that the direct action claims "arise out of" the insurance policies Travelers sold to Manville, and thus fall within the plain language of the 1986 confirmation order. The court of appeals expressed "no doubt that these findings by the bankruptcy court document the ***factual*** origins of Travelers' alleged malfeasance." (App. 32a–33a) (emphasis in original). *See also* App. 33a ("There is little doubt that, in a literal sense, the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville. The bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion."). Yet the appellate court found this factual nexus "of little significance from a jurisdictional standpoint," because (according to the Second Circuit), "drawing the duty line is a function of state and not federal law." (App. 32a) (citation omitted).

Thus, while expressly acknowledging that the confirmation order as written and affirmed barred the direct action lawsuits because they were "based upon, arose out of, or related to Manville's liability insurance policies" (App. 9a), the court of appeals nonetheless ruled that the bankruptcy court ***in 1986*** was "without power to enjoin all claims that literally 'arise out of the insurance policies that Manville purchased from Travelers." (App. 33a n.24).

Essentially approaching the case as though it were a direct appeal of the 1986 confirmation order, the Second Circuit discarded its own decades-old affirmance of the Manville confirmation order and

instead substituted a new test for the scope of bankruptcy jurisdiction. Under the Second Circuit's ruling, bankruptcy courts "lack[] subject matter jurisdiction" to enjoin claims that, "as a matter of state law," purport to relate to "independent" conduct of a non-debtor. (App. 35a–36a).

* * *

The extensive proceedings below took place in four stages: the original entry of the Manville confirmation order in 1986; the Second Circuit's 1988 decision in *MacArthur* affirming the confirmation order on direct appeal; the bankruptcy court's 2004 order enforcing the Manville confirmation order; and the Second Circuit's 2008 ruling that the bankruptcy court "lacked subject matter jurisdiction" to enforce the confirmation order as originally entered and affirmed on direct appeal. Each stage is discussed in turn.

1. The 1986 Confirmation Order

Bankruptcy Judge Burton R. Lifland entered the Manville confirmation order on December 22, 1986, after nearly five years of proceedings in the bankruptcy court. The confirmation order broadly prohibits "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" insurance policies that Travelers issued to Johns-Manville Corporation and its affiliates (collectively, "Manville"). (App. 274a–275a, 439a). In addition, it specifically proscribes all attempts at "collecting, recovering or[] receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation"—whether made "directly or indirectly . . . ." (App. 286a).

The Manville Bankruptcy

The proceedings leading up to the entry of the confirmation order were unprecedented:

> [T]his case is . . . one of the most hard fought in reorganization annals. It has been estimated that there have been some 900 applications or motions, over 1000 orders, approximately 55 adversary proceedings, over 40 appeals (not including writs addressed to the U.S. Supreme Court), 300 odd hearings and thousands of pages of court transcripts. Through it all, this court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings. [App. 223a.]

The breadth and complexity of the Manville bankruptcy proceedings stemmed from the company's century-long involvement "with the mining, manufacture and distribution of asbestos" and asbestos-containing products. (App. 105a). Manville's founder obtained a patent for asbestos insulation in 1868, and at its peak, "Manville marketed more than 500 different lines of products manufactured at the company's 33 plants and mines . . . ." (App. 107a). In addition to its own manufacturing, the company supplied up to eighty percent of the raw asbestos fiber used by other manufacturers in certain industries. (App. 109a).

When the adverse health effects of asbestos led to nationwide product liability litigation,

Manville was the primary target. After the Fifth Circuit upheld a strict liability jury verdict based on occupational asbestos exposure in *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), "Manville was named as a defendant in virtually every asbestos-related personal injury or wrongful death action filed in the United States." (App. 117a). By the time the company filed for bankruptcy protection in August 1982, tens of thousands of lawsuits were pending or forthcoming, "amounting to a potential liability of more than two billion dollars." (App. 191a).

Manville's Insurance Assets

Travelers was Manville's primary insurer from 1947 through 1976, providing twenty-nine comprehensive general liability policies (one for each year of the relationship) and over 425 other policies, including workers' compensation policies, boiler and machinery policies, employers' liability policies, manufacturer and contractor liability policies, owners and contractors protective liability policies, and landlord/tenant general liability policies. (App. 111a–112a). In addition to the obligations Travelers had to indemnify Manville for its substantial asbestos-related liabilities, the extensive contractual relationship between Travelers and Manville included, *inter alia*, the obligation to defend lawsuits against Manville in courts around the country and to negotiate settlements of asbestos-related claims. (App. 113a–130a).

Early in the reorganization process, the bankruptcy court recognized that Manville's insurance policies were the bankruptcy estate's most

valuable asset and were the key to any successful reorganization. (App. 132a). The value of those policies to the bankruptcy estate was in doubt as a result of costly insurance coverage disputes pending in California between Manville, Travelers and dozens of other asbestos manufacturers and insurers, in addition to myriad other claims on the insurance brought by other parties—including Manville factory workers, vendors of Manville products and even other insurers—who claimed rights to defense, indemnity or contribution under the Manville insurance policies.

As the bankruptcy court recognized, the full value of Manville's insurance rights could be collected and used for the benefit of Manville's creditors (the asbestos claimants) only if Travelers and Manville's other insurers "receiv[ed] assurance that ***any*** liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." (App. 170a–171a) (emphasis added). Indeed, Travelers had already exhausted its product liability limits (App. 120a) and would not enter into a settlement absent an assurance of finality. The bankruptcy court concluded that it was "a necessary condition" for Manville's reorganization "to provide the broadest protection possible . . . for Travelers" in order to settle the disputes and make insurance funds available to asbestos victims. (App. 172a).

The Channeling Injunction

The bankruptcy court devised a solution to maximize the value of the estate for Manville's asbestos creditors. The estate's greatest asset—the

insurance rights—would be marshaled, liquidated and equitably distributed via a channeling injunction. Drawing on its broad equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a), and to "enjoin suits that might impede the reorganization process" (App. 200a), the bankruptcy court entered an injunction (incorporated into the confirmation order) with three interrelated provisions:

First, the court channeled all claims to the Manville Trust: "any and all claims or causes of action . . . based upon, arising out of, or related to any or all of the Policies . . . are transferred, and shall attach, solely to the Settlement Fund." (App. 303a).

Second, the Court released Travelers from those claims: "[Travelers] shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims . . . ." (App. 303a). "Policy Claims" are broadly defined as "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Manville] or against [Travelers] based upon, arising out of or relating to the [insurance policies]." (App. 307a).

Finally, the court enjoined all future claims for bad faith or insurer misconduct: "All Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group," and

retained jurisdiction to enforce the terms of the confirmation order. (App. 303a).

These three provisions led to one result: In return for making hundreds of millions of dollars available for asbestos victims, "Manville and its insurers were immunized" from future liability. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 237 F. Supp. 2d 297, 301 (E.D.N.Y. & Bankr. S.D.N.Y. 2002) (Weinstein & Lifland, JJ). *See also* (App. 170a) ("This Court did not intend the scope of finality of the [confirmation order] to be less than 100% of everything Manville-related.").

2. The Second Circuit's 1988 Affirmance on Direct Appeal and Congress's 1994 Enactment Codifying the Manville Result

With the exception of the decision on review in this case, the Manville confirmation order has been upheld each time it was challenged and has been so unparalleled a success that Congress used it as a model for the sole federal legislative response to the asbestos litigation crisis—the Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994).

MacArthur *v.* Johns-Manville

In 1988, the Second Circuit affirmed the Manville confirmation order on direct appeal in two published opinions. The first, *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) (App. 188a–203a), addressed and fully approved the channeling injunction. The second, *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988), affirmed the remainder of the confirmation order.

In *MacArthur*, the Second Circuit considered and rejected a challenge to the bankruptcy court's subject matter jurisdiction made by MacArthur, a distributor of Manville's asbestos. MacArthur "claim[ed] to be a coinsured under [the settled policies] pursuant to 'vendor endorsements' contained in the policies." (App. 192a). Claiming "independent," state-created rights under the policies, MacArthur asserted "that the Bankruptcy Court lacked jurisdiction and authority to enjoin suits against Manville's insurers." (App. 194a). MacArthur also argued that the Manville confirmation order "constitute[s] a *de facto* discharge in bankruptcy of non-debtor parties not entitled to the protection of Chapter 11." (App. 194a).

The Second Circuit rejected MacArthur's challenge to the bankruptcy court's subject matter jurisdiction:

> We conclude that the Bankruptcy Court had jurisdiction over the insurance policies as property of the debtor's estate. Moreover, the court had authority to issue the injunctive orders pursuant to its power to dispose of a debtor's property free and clear of third-party interests and to channel such interests to the proceeds of the disposition. . . .
>
> The flaw in MacArthur's [*de facto* discharge argument] is that the injunctive orders do not offer the umbrella protection of a discharge in bankruptcy. Rather, they preclude only those suits against the settling insurers that arise out of or relate to Manville's insurance policies. [App. 191a, 194a.]

In affirming the Manville confirmation order on direct appeal, the Second Circuit explained that the protection for settling insurers such as Travelers was a "cornerstone" of the plan and "a critical part of the entire reorganization." (App. 192a).

This Court denied certiorari, *see MacArthur Co.* v. *Johns-Manville Corp.*, 488 U.S. 868 (1988), and the Manville confirmation order has been final ever since. Until now, all attempts to challenge it collaterally have been rejected.

Manville's Successful Reorganization

The broad relief contained in the Manville confirmation order was a necessary predicate to payment by Travelers into the Manville Personal Injury Trust. "Because of the insurance settlements [by Travelers and other insurers], the [Manville] Trust has already distributed ***billions of dollars*** to asbestos victims." (App. 136a) (emphasis added). Moreover, the broad relief contained in the Manville confirmation order enabled the Manville Trust, which initially owned the reorganized company, to sell it in 2001 to Berkshire Hathaway for over $2 billion—providing another vital infusion of funds into the Trust. *See* Daniel Gross, *Recovery Lessons From an Industrial Phoenix*, N.Y. TIMES (Apr. 29, 2001).

Today Manville "has annual sales in excess of $2 billion[,] . . . employs approximately 7,800 people and operates 41 manufacturing facilities in North America, Europe and China." *Johns Manville Recognized as a Climate Action Leader by the California Climate Action Registry*, BUSINESS WIRE

(June 23, 2008). This success was only possible because of the channeling injunction in the Manville confirmation order. The bankruptcy court expressly recognized that the injunction was integral to Manville's reorganization when it entered the confirmation order, concluding that "[i]n the absence of the Injunction, one of the central purposes of title 11, *i.e.* preventing the inequitable, piece-meal dismemberment of the Debtors' estates, cannot be achieved." (App. 269a).

Bankruptcy Reform Act of 1994

Congress codified the Manville confirmation order into law in the Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994). Section 111 ("Supplemental Injunctions") added subsections (g) and (h) to Section 524 of the Bankruptcy Code. Under Section 524(g), companies facing asbestos-related liability may qualify for channeling injunctions modeled on the Manville confirmation order if they meet the rigorous procedural safeguards that Congress specified. 11 U.S.C. § 524(g) (App. 470a–478a).

Section 524(g) channeling injunctions supplement the general discharge of the debtor provided for in Section 524(a) of the Bankruptcy Code by allowing courts to channel claims directed at non-debtors. Specifically, the statute authorizes bankruptcy courts to "enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand" channeled to a trust. 11 U.S.C. § 524(g)(1)(B) (App. 470a–471a).

The supplemental injunctions that Section 524(g) authorizes bar claims against any insurance company "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of [the insurer] arises by reason of . . . provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii) (App. 475a–476a). Once such an injunction is entered, it "shall be valid and enforceable and may not be revoked or modified by any court except through [direct] appeal . . . ." 11 U.S.C. § 524(g)(3)(A)(i) (App. 474a).

As set out in the committee report accompanying the Bankruptcy Reform Act, the supplemental injunction provision was "modeled on the trust-injunction in the Johns-Manville case, which pioneered the approach a decade ago in response to the flood of asbestos lawsuits it was facing." H.R. REP. NO. 103–835, at 40 (1994). Finding the Manville confirmation order to be a "creative solution to help protect the future asbestos claimants," *id.*, Congress added subsection (g) to ensure that the "asbestos trust/injunction mechanism . . . is available for use by any asbestos company," *id.* at 41. Subsection (h), in turn, ensures "that Johns-Manville and UNR [another asbestos bankruptcy], both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases." *Id.*

A Senate report accompanying an earlier version of the bill clarified that the new law "is not meant to give the bankruptcy court[s] authority which they do not already possess, and simply

codifies a court's ability to issue supplemental ***permanent*** injunctions which are irrevocable except on appeal." S. REP. NO. 102–279, at 5 (1992) (emphasis added). Here, the supplemental injunction contained in the 1986 confirmation order was entered pursuant to Section 105(a) of the Bankruptcy Code. Following the addition of Sections 524(g) and (h) to the Code, however, the Manville confirmation order has yet another level of statutory protection, in that under subsection (h), the order is "grandfathered" into subsection (g), which renders it "valid and enforceable" and ensures that it "may not be revoked or modified by any court . . . ." 11 U.S.C. § 524(g)(3)(A)(i) (App. 474a).

3. The Bankruptcy Court's 2004 Order Enforcing the Confirmation Order

Years after the bankruptcy court entered the Manville confirmation order, the Second Circuit affirmed the order on direct appeal and Congress codified it, the asbestos plaintiffs' bar began suing Travelers in state courts around the country.[2] These claims are crafted to try to circumvent the bankruptcy court's confirmation order by alleging that Travelers withheld information from the public regarding the dangers of asbestos. The bankruptcy court found that the direct action claims seek to impose liability for "acts or omissions by Travelers

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[2] These lawsuits were referred to below as "direct actions." While the plaintiffs prosecuting these actions assert that they are not "true" direct actions, the label applied is not of consequence. For clarity, Travelers uses the term adopted by all three courts below.

arising from or relating to [its] insurance relationship with Manville." (App. 173a). This finding is unrebutted.

The allegations in the *Wise* complaint filed in a West Virginia state court are typical of the direct action claims. Ten lead plaintiffs from six states purported to bring a nationwide class action against at least fourteen insurance companies (including many vaguely identified affiliates, such as all "insurance entities carrying the name Travelers"). (2d Cir. App. A–435). The suit alleges, *inter alia*, a wide-ranging "conspiracy" between "Johns-Manville and Travelers [to set forth] sworn [interrogatory] answers containing factual errors." (2d Cir. App. A–469 & 489). The *Wise* plaintiffs seek to support their conspiracy allegations by asserting that "Manville and Travelers [worked] closely in their common interest of defending and defeating the growing asbestos litigation and continued their ingenious promotion of the 'no knowledge and no duty to warn' and 'state of the art' defenses." (2d Cir. App. A–505–507). The *Wise* plaintiffs also allege that Travelers and Johns-Manville exchanged information concerning the defense of asbestos claims, and Travelers wrote internal memoranda concerning these exchanges. (2d Cir. App. A–505–507).

The ultimate goal of these direct action suits is to "hold solvent defendants liable for the sins of Manville" even if the targeted defendant "did not make a product to which the plaintiff was exposed" or have anything to do with mining, manufacturing or installing asbestos. W. Mark Lanier, *Conspiracy Theory: Putting New Defendants in Manville's*

Chair, Asbestos L. & Litig., ALI-ABA, Dec. 6–7, 2001 (Am. L. Inst. 2001).[3]

The bankruptcy court concluded that these suits violate both the letter and spirit of the Manville confirmation order, which prohibits "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" the insurance policies that Travelers issued to Manville. (App. 274a–275a, 439a). Judge Lifland made this determination after a full evidentiary hearing at which all parties to this proceeding had the opportunity to present evidence and examine witnesses.

After considering the evidence, Judge Lifland made the fundamental factual finding that any "knowledge" Travelers had acquired "of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations and generally through its lengthy and confidential insurance

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[3] The "Conspiracy Theory" CLE article was written by a prominent Texas attorney who filed direct actions against Travelers. Writing that "[a]sbestos litigation has proved itself to be an extremely resilient phenomenon," this attorney explained that even after Manville's demise, asbestos litigation "continues to grow, drawing in more and more companies." *Id.* These theories are not new. They were first advanced during and after the Manville bankruptcy by dissatisfied asbestos plaintiffs seeking a larger share of the trust. *See In re Joint Eastern & Southern Districts Asbestos Litigation*, 129 B.R. 710, 818–19 (E.D.N.Y. & Bankr. S.D.N.Y. 1991) (discussing claims based upon "conspiracy in the formation [of] and adherence to industry practices"), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992).

relationship under the policies"—a finding that was affirmed by the district court *and* the court of appeals. (App. 128a–129a); *see also* (App. 126a) (stating that to Travelers it was "intuitively obvious [that] issues relating to asbestos and the hazards of asbestos and asbestos litigation ***went hand-in-hand with Manville,*** the largest manufacturer of asbestos, target defendant, and long-time Travelers insured." (emphasis added)).

Judge Lifland therefore concluded that all of the pending direct action suits against Travelers, which alleged that Travelers conspired to conceal the harmful effects of asbestos exposure, sought to hold Travelers liable based on its insurance relationship with Manville, finding as a fact (unchallenged on appeal) "that Travelers learned virtually everything it knew about asbestos" from performance of its contractual duties under the hundreds of insurance policies it issued to Manville over nearly thirty years. (App. 131a).

4. The Second Circuit's 2008 Ruling Sustaining a Collateral Attack

In 2008, following the district court's affirmance of the bankruptcy court's determination that the "direct action" claims were prohibited by the 1986 confirmation order, the Second Circuit accepted Judge Lifland's factual finding that those claims "arise out of" the insurance policies Travelers sold to Manville, and thus fall within the plain language of the 1986 confirmation order. (App. 33a). In fact, the court of appeals had "no doubt that these findings by the bankruptcy court document the ***factual*** origins

of Travelers' alleged malfeasance," but the court opined that these facts are "of little significance from a jurisdictional standpoint," because (according to the Second Circuit) "drawing the duty line is a function of state and not federal law." (App. 32a). The court reasoned that "the 1986 orders must be read to conform with the bankruptcy court's jurisdiction over the res of the Manville estate," so as not to "displac[e]" state courts. (App. 33a) (quotations and internal alterations omitted).

The court of appeals refused to enforce the confirmation order as it was originally written, entered, affirmed and later codified by Congress. Instead, the court ruled that the bankruptcy court ***in 1986*** was "without power to enjoin all claims that literally 'arise out of the insurance policies that Manville purchased from Travelers." (App. 33a n.24). Essentially approaching the case as though it were a direct appeal of the 1986 confirmation order, the Second Circuit discarded its own earlier affirmance of the Manville confirmation order and instead substituted a new test for the scope of bankruptcy jurisdiction:

> In our view, the district [*sic*] court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate. [App. 35a–36a.]

This Court granted a timely petition for certiorari.

SUMMARY OF THE ARGUMENT

The Second Circuit's ruling is wrong for three separate reasons—each of which warrants reversal:

First, the court of appeals failed to apply the plain text of the 1986 Manville confirmation order, holding that the Bankruptcy Clause and federal courts' jurisdiction in bankruptcy are limited to the res of a debtor's estate. (App. 33a). There is no basis for circumscribing bankruptcy jurisdiction in this manner, given this Court's conclusion in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), that the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res."

The lower court's reasoning, if upheld, would have far-reaching implications for a federal statute, 11 U.S.C. § 524(g), which has been the model for nearly every major asbestos-related bankruptcy since its enactment in 1994. Indeed, Congress codified the Manville confirmation order as a model for future cases in Section 524(g), and "grandfathered" the order into 524(g) in the express provisions of Section 524(h). The Second Circuit gave short shrift to Sections 524(g) and (h)—the only federal legislative response to the asbestos litigation crisis to date—when it concluded that bankruptcy jurisdiction must be limited to the res of a debtor's estate.

Second, the court of appeals ruled that the power of federal bankruptcy courts to release and channel claims pursuant to federal law is vulnerable to an end-run purportedly created under the

statutory or common laws of individual states. This holding defies the Supremacy Clause, U.S. CONST. art. VI, cl. 2 (federal law is "the supreme Law of the Land . . . , any Thing in the Constitution or laws of any State to the Contrary notwithstanding"). While a state can create and define the elements of private rights, the holding subordinates the scope and relief authorized by the federal bankruptcy process to rights asserted under state law and allows the laws of the states to "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" contrary to *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

Third, the court of appeals refused to enforce as written a final bankruptcy court confirmation order as it was entered and affirmed decades ago, after Travelers paid tens of millions of dollars in reliance on that confirmation order and after Congress codified the order as a model for future bankruptcies. The judicial system cannot function without finality.

* * *

In sum, the ruling below undercuts Congress's broad power to "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," U.S. CONST. art. I, § 8, cl. 4, as well as the ability of the Judiciary to render final, binding judgments in bankruptcy cases. There is no principled basis in law or logic for the limitations on bankruptcy jurisdiction imposed by the Second Circuit. The judgment below should be reversed and the case should be remanded for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I. BANKRUPTCY JURISDICTION IS NOT—AND SHOULD NOT BE—LIMITED TO THE "RES" OF THE DEBTOR'S ESTATE

"The framers of the Constitution . . . granted plenary power to Congress over the whole subject of 'bankruptcies,' and did not limit it by the language used." *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 187 (1902) (quoting U.S. CONST. art. I, § 8, cl. 4). The "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res," including the power to "issue ancillary orders enforcing [bankruptcy courts'] *in rem* adjudications." *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006).[4] *See also Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this [is] irrespective of whether

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[4] No Justice sitting in *Katz* disagreed with this core principle. *See id.* at 391 (Thomas, J. dissenting) ("The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however, . . . does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to . . . proceedings the majority describes as "ancillary to and in furtherance of the court's *in rem* jurisdiction," though not necessarily themselves *in rem* . . . .").

the court would have jurisdiction if the proceeding were an original one.") (internal citations omitted).

Bankruptcy laws are broad because bankruptcy courts must resolve a range of multiple, often interrelated disputes across a wide range of topics with layers of interested parties, all in a single proceeding. The Nation's bankruptcy courts are—and must remain—forums in which financially distressed entities can secure relief in a manner that reduces the costs of default, maximizes returns to all stakeholders, and rehabilitates viable debtors. The complex disputes brought to the bankruptcy courts require the "flexibility and equity built into Chapter 11 of the Bankruptcy Code," *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 525 (1984), if the objectives of the bankruptcy system are to be fulfilled.

The Second Circuit's res-based jurisdictional limitation is unsupportable in law and untenable in practice. *In rem* jurisdiction is the foundation for much of bankruptcy practice and is often the shorthand for describing typical bankruptcy disputes, but it is not—and has never been—an outer boundary beyond which courts cannot pass. A sharp constraint on jurisdiction will destroy much of that flexibility. *See* ELIZABETH WARREN, CHAPTER 11: REORGANIZING AMERICAN BUSINESSES 171 (Aspen 2008) ("To reach the goals of enhancing the value of the estate and efficiently distributing that value to the creditors of the estate, the bankruptcy laws need to be grounded in the broadest possible jurisdictional reach."). *Cf. Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.

Flexibility rather than rigidity has distinguished it.").

A. Nothing in the Constitution or Laws of the United States Limits Bankruptcy Jurisdiction to the "Res" of a Debtor's Estate

Neither the constitutional grant of bankruptcy power to Congress nor the statutory grant of bankruptcy jurisdiction to the Judiciary contains the limitations the Second Circuit imposed.

Congress's power to legislate "on the subject of Bankruptcies," U.S. CONST. art. I, § 8, cl. 4, is plenary. As this Court has held, when an act of Congress is claimed to fall outside the scope of the Bankruptcy Clause, "the simple question is: 'Does [the challenged act] constitute a law on the subject of bankruptcies?'" *Continental Illinois National Bank & Trust* v. *Chicago, Rock Island & Pacific Railway*, 294 U.S. 648, 667 (1935). *See also Hanover National Bank*, 186 U.S. at 192 ("Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law . . . .").

The Framers viewed as self-evident the necessity of a national bankruptcy power. James Madison wrote that "[t]he power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties live, or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question." THE FEDERALIST NO. 42, at

238 (James Madison) (E.H. Scott ed., 1898). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1100 (1833) ("The brevity, with which the subject is treated by the Federalist, is [illegible] remarkable."). This brevity was likely occasioned by the fact that "the necessity for a single national law governing such collective proceedings seemed self-evident." Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2286 (2000).

Pursuant to its broad Article I, Section 8 constitutional power, Congress has granted the federal courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).[5] This Court also has specifically cited the Manville confirmation order as a proper exercise of a bankruptcy court's jurisdiction. *See Celotex Corp.* v. *Edwards*, 514 U.S. 300, 310–11 (1995) (citing the 1988 affirmance of the injunction in the Manville confirmation order as being in accord with the Court's holding). From the first bankruptcy law, Congress recognized that only a broad grant of jurisdiction would suffice. *See* 9 ANNALS OF CONG. 624 (1799) ("The necessity of a bankrupt law results wherever a nation is in any considerable degree commercial. No commercial people can be well governed without it. Wherever there is an extensive commerce, extensive credits must be necessarily given.") (Rep. Bayard).

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[5] The Judicial Code lists "confirmations of plans" as core proceedings "arising under" or "arising in" a bankruptcy case. 28 U.S.C. § 157(b)(2)(L).

Earlier bankruptcy jurisdictional grants were broad and unquestionably reached "beyond the res" of the debtor's estate. Justice Stevens' opinion for the Court in *Katz* noted that the first bankruptcy statute Congress enacted "gave bankruptcy commissioners appointed by the district court the power, *inter alia*, to imprison recalcitrant third parties in possession of the estate's assets." *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006) (citing Bankruptcy Act of 1800, 6 Cong. Ch. 19, § 14, 2 Stat. 19 (Apr. 4, 1800)).

The 1800 Act also provided that bankrupt debtors arrested by authorities contrary to the act are to be released upon giving the arresting officer the summons from the bankruptcy commissioners (2 Stat. 32, §22), and authorized federal writs of habeas corpus to free individuals arrested by a state on a discharged debt (2 Stat. 32, § 38).[6] Protection of the debtor—not just the res—was a critical element of the nation's first bankruptcy law.

Nothing in the subsequent bankruptcy laws passed by Congress (the Bankruptcy Acts of 1841, 1867 and 1898) restricts bankruptcy jurisdiction to a particular res. Decisions applying those laws beyond a debtor's particular property include, for example, *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S.

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[6] "This grant of habeas power is remarkable not least because it would be another 67 years, after ratification of the Fourteenth Amendment, before the writ would be made generally available to state prisoners." *Katz*, 546 U.S. at 374. The inclusion of the habeas remedy in the 1800 Act was one of only a few additions made to what was otherwise a nearly exact replica of British bankruptcy statutes. *Id.* at 373–74.

215 (1941) (holding that, even in the absence of express statutory authority, the 1898 Act permitted consolidation of property of a non-debtor with a debtor's estate); *Petition of Portland Electric Power Co.*, 97 F. Supp. 877 (D. Or. 1943) (enjoining a state public utilities commissioner from taking action against a public utility company that was a non-debtor subsidiary of the debtor); *In re Skorcz*, 67 F.2d 187, 190 (7th Cir. 1933) (concluding that although debtor's post-bankruptcy wages "constituted no part of the bankrupt's estate at the time of the adjudication," the bankruptcy court nonetheless had "plenary power to [protect post-bankruptcy wages] by injunction"). *See also* Chandler Act, Pub. L. No. 75-696, 52 Stat. 840 (June 22, 1938) § 67(a)(5) (amending 1898 Act to permit discharge of a non-debtor's state law-recognized independent claims against a non-debtor surety); 11 U.S.C. § 547(d) (same, in present Bankruptcy Code).

There is no warrant in the constitution or laws of the United States to restrict the "broad authority" vested in the Nation's bankruptcy courts, *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990), by artificially limiting it to a particular "res."

B. Bankruptcy Courts Cannot Function Properly Without Jurisdiction to Enter Ancillary Orders Effectuating Their *in Rem* Adjudications

The broad jurisdiction and authority of bankruptcy courts is critical for the fair and equitable resolution of commercial matters, and is most evident in the mass tort context, including

asbestos, other products liability contexts, and even large financial losses. By hewing to the Constitutional grant of authority to Congress to establish a uniform law of bankruptcies for more than two centuries, this Court has preserved the ability of Congress to write bankruptcy laws that respond to a wide variety of economic challenges.

Three bankruptcy court-supervised resolutions of sprawling controversies illustrate the importance of bankruptcy court authority beyond the confines of a res, and the damaging implications of the Second Circuit's ruling:

Drexel Burnham Lambert: In settlement of SEC charges, Drexel Burnham Lambert Group agreed to create a $350 million fund to compensate investors. *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 913 (Bankr. S.D.N.Y. 1991). Drexel contributed $200 million, but filed for bankruptcy before the remainder came due.

In the bankruptcy proceedings, Drexel reached a comprehensive settlement with the SEC and approximately 15,000 other claimants in which Drexel agreed to contribute the remaining $150 million to the SEC fund which, together with Drexel's remaining assets, would be divided among the various claimants. A key feature of the settlement was a permanent injunction barring future lawsuits against Drexel's former directors and officers. *Id.* at 928.

Affirming the non-debtor injunction as an appropriate exercise of bankruptcy court discretion, the Second Circuit stated that protecting the directors and officers "enable[d] the directors and

officers to settle these suits without fear that future suits will be filed." "Without the injunction," the court recognized, the directors and officers would be less likely to settle, obstructing a resolution that would maximize funds available to those whom the debtor had injured. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992).

A.H. Robins: Robins, a large pharmaceutical company, faced billions of dollars in liability arising out of its sale of the Dalkon Shield. Robins sought bankruptcy protection, and ultimately negotiated a reorganization plan which entailed a merger with another company. Robins's merger partner agreed to contribute substantial funds toward resolution of the tort claims but only if it and certain third parties received protection against future liability through entry of a permanent channeling injunction.

Certain claimants challenged the company's reorganization plan, arguing that the bankruptcy court lacked authority to enjoin their independent claims, including state-law claims against non-debtor third parties (Robins's directors, attorneys, primary casualty insurer and the insurer's attorneys, and even physicians who had prescribed the Dalkon Shield). Giving particular weight to the "impact of the proposed suits on the bankruptcy reorganization," and the fact that the barred claimants had elected to opt out of a well-funded trust and instead seek to pursue their claims in the tort system, the Fourth Circuit affirmed the power of the bankruptcy court to bar a variety of claims against third parties whose participation in a bankruptcy settlement was crucial. *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 701 (4th Cir. 1989).

Dow Corning: Dow Corning manufactured half of the silicone gel breast implants used in the United States for nearly thirty years, and supplied silicone materials to other manufacturers. When studies revealed possible adverse health consequences associated with the implants, the FDA ordered the products removed from the market. Tens of thousands of personal injury lawsuits were filed against Dow and its two shareholders, Dow Chemical Company and Corning, Incorporated.

In its reorganization, Dow established a $2.35 billion fund to pay personal injury claims, government health care providers and other creditors. Dow's products liability insurers, shareholders and operating cash reserves contributed to the fund. Critically, in exchange for these contributions, the bankruptcy court approved the release of Dow's insurers and shareholders from all further liability, and enjoined anyone from bringing actions against these entities. All potential claims were channeled to the trust established in the reorganization plan.

The Sixth Circuit held that the releases and injunctions were legitimate exercises of bankruptcy court power, so long as they were supported by an appropriate factual predicate. *See In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002) (noting bankruptcy courts' broad authority as courts of equity) (citing *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990)). Enumerating seven factors necessary to justify an injunction against non-consenting creditors, the court remanded for further factual findings. On remand, the district court (having withdrawn the reference from the

bankruptcy court) found that the non-debtor releases and injunctions met the Sixth Circuit's test and approved the plan and injunctions in full. *In re Dow Corning Corp.*, 287 B.R. 396, 416 (E.D. Mich. 2002), *appeal dismissed*, Case No. 03-1036 (6th Cir. 2003).[7]

None of the comprehensive reorganizations in these multi-faceted cases could have occurred under the Second Circuit's unprecedented theory of bankruptcy court jurisdiction, in which the reach of bankruptcy court jurisdiction is strictly circumscribed by what the court of appeals defines as the res of the debtor's estate, such that the federal confirmation orders are easily circumvented by artful pleading. While these cases arose in contexts as diverse as financial services, manufacturing and other industries, the issue is particularly acute in the

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[7] *See also In re Airadigm Communications, Inc.*, 519 F.3d 640 (7th Cir. 2008) (allowing, in certain circumstances, "a bankruptcy court [to] release a non-debtor from creditor liability over the objections of the creditor"); *In re Continental Airlines*, 203 F.3d 203, 211 & n.6 (3d. Cir. 2000) (stating that the Bankruptcy Code "explicitly authorize[s] the release and permanent injunction of claims against non-debtors" under 11 U.S.C. § 524(g), which "establish[es] procedure for resolving asbestos claims"); *In re Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) (bankruptcy court properly enjoined third-party claims against non-debtor in connection with settlement of adversary proceeding); *In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991) (bankruptcy court properly enjoined state-court environmental lawsuit between debtor's landlord and a secured creditor of debtor's bankruptcy estate, notwithstanding that claim was not "derivative" of debtor's liability, and where the sole effect on the debtor's estate was a possible indemnity claim against debtor's estate), *overruled on other grounds by Connecticut National Bank* v. *Germain*, 503 U.S. 249 (1992).

context of bankruptcies involving mass torts, and especially asbestos litigation.

The strain on the judicial system and resources of parties occasioned by asbestos litigation dwarfs that of all other mass torts. The Johns-Manville case alone resolved *hundreds of thousands of potential lawsuits and has provided billions of dollars* in funds for the benefit of asbestos claimants. To limit the scope of that settlement after twenty years of payouts not only reverses two decades of settled reliance but also destroys confidence in negotiated settlements in other mass tort cases in the future.

Here, the Second Circuit's analysis allows artful pleading to defeat the plain language and intent of the Manville confirmation order—which unequivocally bars "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" insurance policies Travelers issued to Manville. (App. 274a–275a, 439a). The dispositive fact is that the direct action claims against Travelers arise out of the performance of its duties to defend Manville and to handle Manville claims. This is precisely why the injunction was not limited to enjoining claims against the "proceeds" of the policies. Congress's enactment of Sections 524(g) and (h) is a legislative determination that the nexus Judge Lifland identified here is sufficient, and the court of appeals was without authority to override that judgment by imposing new limitations on the scope of the Manville confirmation order.

C. The Second Circuit's Attempt to Limit the Reach of the Manville Confirmation Order to a Specified Set of "Policy Limits" Ignores the Bankruptcy Court's Extensive Factual Findings Demonstrating the Nexus Between the Direct Action Claims and the Contractual Obligations Travelers had to Manville

The Second Circuit defined the insurance portion of the res of Manville's estate to mean the particular dollar limits of over 425 separate insurance policies Travelers issued to Manville in the course of their twenty-nine-year relationship (which the court of appeals termed "Manville's insurance policy proceeds") (App. 6a). The Second Circuit attempted to draw a distinction between this res, on the one hand, and every other incident and component of the broad and deep contractual ties between Travelers and Manville pursuant to which, for example, Travelers (pursuant to its duty to defend) defended and settled lawsuits filed against Manville in courts around the country. In the Second Circuit's view, then, the contractual obligation to indemnify up to a particular policy limit was part of the res of the bankruptcy estate, while every other incident of and duty inherent in the contractual insurance relationship is not.

As a threshold matter, the Travelers products liability limits were exhausted by the time the Manville plan of reorganization was confirmed and the confirmation order became a final order. (App. 134a, 199a). If the channeling injunction incorporated in the 1986 confirmation order were meant to apply only to "policy limits," there would

have been no point in including such a provision, as there were no products liability limits remaining. This fact alone demonstrates the error in the Second Circuit's analysis.

In any event, the distinction drawn by the Second Circuit (between "policy proceeds" on the one hand, and every other obligation imposed on Travelers under the policies) is not consistent with the actual obligations of the parties' contractual relations, let alone workable or even understandable enough to delineate a jurisdictional boundary. The bankruptcy court's unchallenged factual findings detail how "[e]very dollar paid by Travelers on account of Manville . . . correlated to a specific provision in the policies that Travelers issued to Manville." (App. 130a). As just one example, the bankruptcy court discussed the contractual obligation Travelers had to defend Manville in personal injury litigation—the performance of which is a central focus of the direct action lawsuits. The bankruptcy court noted that the *Sorrels* complaint, for example, attempted to hold Travelers liable for Manville's alleged misrepresentations:

> Manville, acting as agent for Travelers, misrepresented information concerning, among other things, animal studies concerning the relationship between asbestos exposure and cancer. [App. 145a (internal citation omitted).][8]

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[8] Other direct action complaints asserted that Travelers facilitated the presentation of fraudulent "state of the art" defenses while understanding, *via* Manville, that asbestos was hazardous; that Travelers wrote memoranda about the

During the Manville bankruptcy, the bankruptcy court never limited its assessment of Manville's interest in the Travelers policies to the "proceeds" of those policies. Indeed, the court noted that, in addition to a duty to indemnify, the policies imposed a duty to defend. *See In re Johns-Manville Corp.*, 33 B.R. 254, 267–68 (Bankr. S.D.N.Y. 1983) (recognizing that even aside from the "pool of insurance proceeds" that is "finite" and has "clearly defined parameters," the policies Travelers sold to Manville "obviously have value to the Manville estate" insofar as "the insurers may be called upon to defend" Manville in tort actions in addition to its obligations to indemnify Manville). Other duties inherent in the contractual relationship—including duties of confidentiality and good faith—are similarly valuable and were clearly encompassed within the scope of the Manville confirmation orders. It is apparent, therefore, that limiting the scope of the bankruptcy court jurisdiction to the "res" of "insurance policy proceeds" is illogical and unworkable.

But in any event, the search for a particular, discrete "res" upon which to tether bankruptcy court jurisdiction misses the mark. Again, "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing . . . for more

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potential litigation crises that would arise from asbestos, again based on its insurance relationship with Manville; and that Manville and Travelers gave "sworn answers containing factual errors" in response to interrogatories in pre-bankruptcy asbestos personal injury litigation. (App. 143a–144a). All of these allegations plainly "arise out of" Travelers providing insurance to Manville.

than simple adjudications of rights in the res." *Katz*, 546 U.S. at 370. Thus, "while the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts' powers—issuance of writs of habeas corpus included—unquestionably involved more than mere adjudication of rights in a res." *Id.* at 378. *See also United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990) (affirming the bankruptcy court's power to restructure debtor/creditor relationships in a plan of reorganization not limited to assets in which the debtor has a property interest).

The Second Circuit's concern that the breadth of the Manville confirmation order could "lend[] itself to abuse" (App. 30a) or "displace[] state courts" (App. 33a) is misplaced. The bankruptcy court's enforcement order affirmatively states that "nothing in this Order shall enjoin . . . claims arising from contractual obligations by Travelers to policyholders other than Manville" (App. 96a), so long as such claims are not grounded in the contractual relationship between Travelers and Manville. In affirming the bankruptcy court's enforcement order, the district court noted that nothing in it would bar "a suit alleging tortious conduct by Travelers on behalf of a non-Manville insured, conduct that is unrelated to Manville and not based on any knowledge of asbestos hazard[s] gained from Manville, and that did not involve Manville asbestos or asbestos products." (App. 67a).[9]

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[9] Abuse in the bankruptcy field, like abuse in other legal areas, can come from many directions. The Bankruptcy Code gives federal courts—including reviewing courts—a number of tools to challenge any alleged overreaching. A proposed plan of

Over seventy years ago, this Court surveyed the history of federal bankruptcy legislation and concluded that the laws and judicial decisions on the topic "demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day." *Continental Illinois National Bank & Trust* v. *Chicago, Rock Island & Pacific Railway*, 294 U.S. 648, 671 (1935). "And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted

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reorganization must meet at least sixteen statutory conditions to be confirmed. *See* 11 U.S.C. § 1129(a)–(b). Federal courts have limited the scope of a bankruptcy order in a number of fact-specific circumstances. For example, a proposed plan may not legitimatize a transfer in fraud of creditors (11 U.S.C. § 548), may not modify the standards for allowance of claims in bankruptcy (11 U.S.C. § 502(b)), may not alter the terms of a contract to be assumed under the plan (*NLRB* v. *Bildisco & Bildisco*, 465 U.S. at 531–32 (debtor "assumes the contract *cum onere*")), and may not obtain injunctive relief for non-debtor foreign affiliates for the purposes of facilitating a sale by the common parent of the debtor (*In re Combustion Engineering, Inc.*, 391 F.3d 190, 224–33 (3d Cir. 2004)). To the extent it is implicated in a proposed plan, the standards for complying with Section 105 are highly dependent upon all the relevant facts and circumstances in the context of the proposed plan. The Supreme Court long ago recognized that the bankruptcy power cannot be completely demarcated by a single rule or set of rules: "The capacity of the bankruptcy clause to meet new conditions as they have been disclosed [has] not gone beyond the limit of congressional power; but [rather] have constituted extensions into a field whose boundaries may not yet be fully revealed." *Continental Illinois*, 294 U.S. at 671.

extensions into a field whose boundaries may not yet be fully revealed." *Id.*

The Second Circuit's narrow construction of bankruptcy jurisdiction does not accord with well-settled constitutional and statutory law as construed by this Court for over a century. The result is both unprecedented and unwarranted, and should be reversed.

II. THE SUPREMACY CLAUSE REQUIRES THAT THE TERMS OF A BANKRUPTCY CONFIRMATION ORDER ARE BINDING ON ALL PRIVATE RIGHTS RESOLVED BY THAT FEDERAL ORDER, HOWEVER THEY ARE CREATED

In addition to incorrectly limiting bankruptcy jurisdiction to the "res" of a debtor's estate, the court of appeals compounded that error by holding that a final ***federal*** order can be circumvented because state law—not the federal court—determines the scope of the federal order. Having concluded that Judge Lifland's detailed analysis of the actual facts and the scope of his own order was "of little significance from a jurisdictional standpoint," (App. 70a) the Second Circuit proceeded to redefine the scope of the already-affirmed Manville confirmation order by "look[ing] to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose." (App. 24a). Whether the duty was or was not covered by the initial federal order is something the federal courts must resolve, not the state courts.

The Second Circuit's newly-announced limitation on the application of the Supremacy Clause has no basis in the text of the Bankruptcy Clause, the Judicial Code or the Bankruptcy Code, and the Second Circuit cited not a single case in support of the extraordinary notion that the state courts shall determine the scope of a federal confirmation order. Here, the Manville confirmation order bars "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" the insurance policies that Travelers issued to Manville. (App. 274a–275a, 439a). The Second Circuit agreed that the direct action claims against Travelers fall within the plain scope of that prohibition, yet it refused to enforce the injunction by its terms because (in the Second Circuit's view) enforcement "risks . . . displacing state courts for large categories of disputes in which someone may be bankrupt." (App. 33a).

The Second Circuit's analysis is misplaced. Under the Supremacy Clause, power lawfully granted by Congress to bankruptcy courts pursuant to Congress's constitutional authority to enact "uniform laws on the subject of Bankruptcies" cannot be overridden by state law. This Court enforced this principle in *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971). The petitioners (Mr. and Mrs. Perez) were Arizona residents involved in a vehicle collision with a third party, who sued the Perezes and secured a money judgment against them. Prior to the judgment issuing, however, the Perezes filed for bankruptcy protection. The bankruptcy court ultimately discharged the Perezes from all pre-bankruptcy debts and claims, including the adverse state court judgment. During the pendency of the

bankruptcy proceedings, the Arizona state legislature enacted a statute providing that judgment debtors in lawsuits stemming from automobile accidents may be stripped of their driving privileges if they fail to pay the money owed pursuant to those judgments within a specified period. The statute specifically stated that a "discharge in bankruptcy" would not relieve a debtor of his obligation to satisfy a judgment or prevent his license from being revoked. *Id.* at 642. This Court held that the Arizona statute was unconstitutional because it was "inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law" necessarily runs afoul of the Supremacy Clause. *Id.* at 652.

Perez continued this Court's rulings that private rights arising under state law must yield to federal bankruptcy courts' orders with which they conflict. In *Local Loan Co.* v. *Hunt*, 292 U.S. 234 (1934), respondent Hunt borrowed money from the petitioner and assigned a portion of his future wages as security. Hunt later filed for bankruptcy and received a full discharge. Hunt's creditor nonetheless sued in Illinois state court, arguing that Hunt's post-bankruptcy wages were not part of Hunt's estate in bankruptcy, and that the creditor's state-court attempts to collect on its state law-recognized property interest in Hunt's post-bankruptcy wages were proper because the wages "were not even part of Hunt's estate in bankruptcy." *Id.* at 236–37. This Court upheld the lower court's decision to enjoin the creditor's state-court suit against Hunt, concluding that state laws that frustrate "the general purpose and policy" of federal bankruptcy law "cannot be accepted as controlling

the action of a federal court." *Id.* at 244–45. *See also Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902) (holding that a right to enforce judgment on a note, as permitted by state law, is subject to discharge in bankruptcy).

Perez, *Local Loan* and *Hanover National Bank* foreclose the reasoning and result of the court below. The force and effect of a federal confirmation order is not dependent on whether an asserted state law-created right exists. In all three cases, the assumed validity of the state law claim was irrelevant to the federal question regarding the scope of the federal bankruptcy court's injunction order. Inasmuch as the Manville confirmation order bars any claims against Travelers that "arise out of" or "relate to" the insurance policies Travelers issued to Manville, the court of appeals erred in concluding that Travelers may nonetheless be held liable for such claims if "the laws of the states where the claims [against Travelers] arose" purport to authorize liability against Travelers based on its insurance relationship with Manville. Such a result surely would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez*, 402 U.S. at 649 (quotation omitted), and must yield to the Manville confirmation order.

Virtually all claims dealt with in a confirmation order are created by non-bankruptcy law (*e.g.*, federal statutory or common law, state statutory or common law). To allow alleged state law-created rights to override express provisions of a federal confirmation order undermines the ability of bankruptcy courts to release asbestos-related liabilities in a confirmation order. The court's

decision below that "there is not one but many courthouses where the legitimacy of these actions must be tested" (App. 36a) misses the point entirely. States can create and define the elements of private rights. But under the Supremacy Clause, when alleged state law-created causes of action are dealt with in a federal confirmation order (here, such causes of action were settled, released and channeled to a trust within federal bankruptcy court jurisdiction), they can no longer be pursued. The opposite conclusion would result in precisely the type of state-dependent variation and uncertainty that the Supremacy Clause is designed to prevent.

III. THE SECOND CIRCUIT'S DECISION UNDERMINES IMPORTANT PRINCIPLES OF JUDICIAL FINALITY AND REPOSE

Upon affirmance by an appellate court, the finality and repose afforded by a federal court judgment "acquires an added moral dimension." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998). In the intervening two decades since the bankruptcy court entered the confirmation order in this case, that order has governed the rights and obligations of hundreds of thousands of Manville asbestos claimants and other interested parties. The confirmation order allowed these hundreds of thousands of asbestos claimants to pursue their rights and obtain compensation without the traditional cost and delay associated with the judicial system. No court—prior to the panel that rendered the decision below—had ever questioned the validity of the long-final confirmation order in this case.

A. Final Confirmation Orders Are Not Subject to Collateral Attack

The court of appeals' decision to revisit the propriety and scope of the confirmation order nearly a quarter century after the fact "dishonor[s] the historic wisdom in the value of repose." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 219 (2005) (quotation omitted). By rewriting the Manville confirmation order retroactively to give enterprising plaintiffs' lawyers an "end run" around its core provision, the decision below signals "a willingness to reconsider other [orders]. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 757 (2008).

Disruption, confusion, and uncertainty are especially damaging in the bankruptcy context. "Bankruptcy is an intensely practical affair," *In re Cooper Commons LLC*, 512 F.3d 533, 534 (9th Cir. 2008), requiring stable, clear and uniform rules upon which parties can rely when making business and legal decisions. Once a confirmation order is entered and affirmed in full (as the Manville confirmation order was affirmed by the Second Circuit in 1988), parties must be able to rely on the enforcement of that order. *See In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993) (recognizing that "the ability to achieve finality is essential to the fashioning of effective remedies," particularly "in bankruptcy proceedings").

The paramount importance of finality of bankruptcy court confirmation orders is illustrated

by *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). In May 1934, Congress amended the Bankruptcy Code to prescribe the mode and conditions under which a municipality or other political subdivision of a state could effect a debt readjustment. *See* Municipal Bankruptcy Act, Pub. L. No. 73-251, 48 Stat. 798 (May 24, 1934). The Chicot County Drainage District, a political subdivision of the State of Arkansas, sought readjustment of its indebtedness under these new provisions, and a final decree was entered effecting the readjustment in 1936.

After the decree was final and no longer subject to appeal, this Court held that the law under which the debt readjustment had been ordered was unconstitutional as it improperly interfered with state sovereignty. *See Ashton* v. *Cameron County Water Improvement District*, 298 U.S. 513 (1936). Following *Ashton*, a bondholder of Chicot County Drainage District attempted to attack the original readjustment decree collaterally, arguing that *Ashton* rendered it void.

While the district court and appellate court were willing to set aside the final decree, this Court reversed, holding that the lower courts' prior determinations had been "deemed to have finality and [were] acted upon accordingly" by the parties involved. *Chicot County*, 308 U.S. at 374. The Court reasoned that because the lower courts had full authority "to determine whether or not they have jurisdiction" and to "construe and apply the statute under which they are asked to act," *id.* at 376, their earlier (and now final) conclusion that the act was constitutional and the relief was proper, "while open

to direct review, may not be assailed collaterally." *Id.* *See also Kontrick* v. *Ryan*, 540 U.S. 443, 455 n.9 (2004) ("Even subject-matter jurisdiction . . . may not be attacked collaterally."); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

The Second Circuit's decision to rewrite the Manville confirmation order cannot be squared with this Court's holding in *Chicot County*. Even if there were some infirmity in the bankruptcy court's 1986 order (and there most certainly was not, as an earlier Second Circuit panel concluded in 1988 on direct review), any such challenge was solely "open to direct review," not collateral attack. *Chicot County*, 308 U.S. at 376. *Cf. CBOCS West, Inc.* v. *Humphries*, 128 S. Ct. 1951, 1961 (2008) (legal stability requires respect for settled decisions regardless of "whether judicial methods of interpretation change or stay the same").

It is particularly telling that the primary authorities relied on by the Second Circuit to find fault with the Manville confirmation order—*In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), and *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005)—were decided on ***direct appeal*** of the orders in question.[10] If the original panel opinion in

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[10] *Metromedia*, in fact, ultimately affirmed the (non-asbestos-related) non-debtor injunction entered in that case, even though the court concluded on direct review that the non-debtor release was insufficiently supported by the record. 416 F.3d at 138. While "[i]nsufficient findings would ordinarily be remedied by remand to the bankruptcy court," *id.* at 143, the *Metromedia* court reasoned that because the plan had been substantially consummated in the absence of a stay pending appellate review, "[v]acatur and remand would . . . unsettle . . . a critical component of the Plan . . . and that none of the

MacArthur (affirming the Manville confirmation order on direct appeal in 1988) had reached the same conclusion as the panel opinion below, Travelers would never have contributed to the Manville trust, *MacArthur*, 837 F.2d at 90 ("The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal."), and Manville could not have reorganized into the successful enterprise it is today.

B. Public Policy Favors Finality

More than twenty years ago, Judge Lifland recognized correctly that finality was critical. It was critical to Johns-Manville to enable it to emerge from bankruptcy, to insurers such as Travelers that contributed to the asbestos personal injury trust, and to the asbestos claimants who benefited from those contributions. It is the finality offered by orders modeled on this case and those entered pursuant to Section 524(g) that has allowed some seventy companies with asbestos liabilities to reorganize successfully and provide funds to compensate those injured by asbestos. The promise of finality induced insurers to fund asbestos trusts for the benefit of asbestos claimants. Indeed, as Judge Lifland explained:

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completed transactions can be undone without violence to the overall arrangements." *Id.* at 145. This respect for settled expectations and reasonable reliance on even a non-final order stands in stark contrast to the Second Circuit's decision on review here, which brushed aside the long-final Manville confirmation order as though the court were deciding a direct appeal.

> The Court's repeated use of the terms "arising out of" and "related to" [in the court's 1986 orders was] not gratuitous or superfluous; [these terms] were meant to provide the broadest protection possible ***to facilitate global finality*** for Travelers ***as a necessary condition*** for it to make a significant contribution to the Manville estate. [App. 172a (emphasis added).]

Limiting the scope and finality of the Manville confirmation order threatens drastically to reduce, if not eliminate, the incentive for insurers to contribute the monies necessary to make 524(g) trusts the vehicle for distribution of assets to asbestos victims—a fact that practitioners and commentators have emphasized in criticizing the Second Circuit's decision. *See, e.g.*, Dan Schechter, *Despite § 524(g), Global Settlement in Asbestosis Case Cannot Deprive Third-Party Plaintiffs of Direct Actions Against Nondebtor Insurer*, 2008 COMMERCIAL FINANCE NEWSLETTER 18 (Feb. 25, 2008) ("If this opinion stands . . . , quite a few supposedly 'global' asbestos settlements will be imperiled. Some insurers will decline to participate in Manville settlements.").

In the two decades since the bankruptcy court entered the confirmation order in this case, that order has governed the rights and obligations of hundreds of thousands of Manville asbestos claimants and other interested parties. It allowed hundreds of thousands of asbestos claimants to pursue their rights and obtain compensation without the traditional cost and delay associated with the judicial system. Likewise, literally ***tens of billions of dollars*** have been committed to asbestos trusts in

cases throughout the country based on the premise that the channeling mechanism originally used by Judge Lifland in the Manville bankruptcy would provide all parties with finality, and that, once entered and affirmed, the finality of those orders would be respected. The court of appeals erred in disregarding its original affirmance of the Manville confirmation order in 1988 and the widespread societal reliance on the finality of that affirmance.

Adherence to settled decisions "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U.S. 254, 265–66 (1986). The decision below disregarded this fundamental principle.

C. The Bankruptcy Reform Act of 1994 Prohibits Collateral Attacks on the Manville Confirmation Order

The Second Circuit's 1988 affirmance of the Manville confirmation order in *MacArthur* was based upon a construction of the Bankruptcy Code and the Judicial Code. *See MacArthur*, 837 F.2d at 91–93 (construing, *inter alia*, 11 U.S.C. §§ 105, 362, 363 & 541 and 28 U.S.C. §§ 157 & 1334). Adherence to precedent has "added force" when a prior decision interprets a statute, because "unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done." *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991).

The need to adhere to precedent is even ***greater*** here. Congress has not altered the result in *MacArthur* and its construction of bankruptcy jurisdiction. In fact, Congress has expressly ratified and approved Judge Lifland's confirmation order. The Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994), which added Section 524(h) to the Code, specifically ratified the Manville confirmation order, which Congress concluded had "met and surpassed the standards imposed in this section." H.R. REP. NO. 103-835, at 41 (1994). Moreover, going forward, Congress provided in Section 524(g) that when a bankruptcy court enters a confirmation order containing an asbestos-related channeling injunction issued or affirmed by a district court, "then after the time for appeal of the order that issues or affirms the plan . . . the injunction shall be valid and enforceable ***and may not be revoked or modified by any court*** except through [direct] appeal . . . ." 11 U.S.C. § 524(g)(3)(A)(i) (App. 474a) (emphasis added). Respect for "longstanding observances and settled expectations," *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 218 (2005), are at their zenith here, where the Congress of the United States expressly "grandfathered" its effectiveness and adopted the Manville confirmation order as a blueprint for future proceedings.

The inequity of altering bankruptcy court protections—*ex post* and without compensation—is the very reason why settled authority prohibits collateral attacks on Chapter 11 reorganizations. Redefining the scope of a long-final confirmation order "unravel[s] intricate transactions so as to knock the props out from under the authorization for

every transaction that has taken place," and thereby creates "an unmanageable, uncontrollable situation" for courts and litigants alike. *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993) (quotation omitted).

CONCLUSION

For the reasons set out above, Petitioners respectfully submit that the Second Circuit's opinion must be reversed and the case remanded for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED

Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioners,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

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QUESTIONS PRESENTED

1. Whether bankruptcy courts have the statutory authority to enjoin state-law claims against a non-debtor that (a) do not arise from the non-debtor's derivative liability for the conduct of or claims against the debtor, but instead from an independent legal duty owed by the non-debtor to the plaintiffs; and (b) will have no effect on the bankruptcy estate.

2. Whether the Court of Appeals erred in directing the bankruptcy court to examine state law to ascertain the nature and elements of the state-law claims at issue in order to determine whether, as a matter of federal law, the claims may be enjoined.

3. Whether the Court of Appeals improperly entertained a collateral attack on the bankruptcy court's 1986 orders when it held that "the bankruptcy court had jurisdiction and authority to enter the 1986 orders," but "erred by subsequently interpreting those orders without reference to" the limitations on the bankruptcy court's power.

RULE 29.6 DISCLOSURE

Chubb Indemnity Insurance Company is a wholly-owned subsidiary of Federal Insurance Company, which in turn is a wholly owned subsidiary of The Chubb Corporation, which is publicly held. No publicly held company otherwise directly or indirectly owns 10% or more of Chubb Indemnity Insurance Company.

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STATEMENT OF THE CASE

Bankruptcy is about debtors. Its purpose is to address competing claims to a debtor's assets through the exercise of *in rem* jurisdiction over those assets, and, where appropriate, to grant the debtor a discharge of preexisting debt. Bankruptcy does not as a rule affect claims against non-debtors. This case thus presents a question about the outer boundaries of bankruptcy court power: the extent to which bankruptcy courts may grant permanent non-consensual releases of claims against non-debtors who have not submitted themselves or their assets to the rigors of bankruptcy and whose creditors do not receive the protections prescribed by the Bankruptcy Code.

As this Court has repeatedly explained, the central purpose of bankruptcy law is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among creditors." *Straton* v. *New*, 283 U.S. 318, 320-321 (1931). The bankruptcy court's *in rem* control over all of the debtor's property is, at bottom, the source of its authority to discharge the debtor of its pre-bankruptcy debts. *See Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447 (2004). Only the necessity of dividing a limited fund among competing claimants, and the debtor's agreement to relinquish control over its property for that purpose, can justify permanently barring creditors from asserting their pre-bankruptcy claims against the debtor. The very nature and purposes of bankruptcy thus dictate that to the extent bankruptcy courts have the authority to grant such a permanent bar of claims against *non-debtors*, that authority can be exercised only when necessary to effectuate the Bankruptcy Code's specific provisions de-

signed to preserve the debtor's estate and allocate it equitably among competing claimants.

Even courts that have taken the most permissive view of the power to enjoin claims against non-debtors have thus recognized that its use can be justified only in extraordinary cases—where assertion of such claims would burden the debtor or threaten to deplete the estate. That is so only when claimants seek to hold the non-debtor derivatively liable for the debtor's acts or omissions. By definition, the threat to the bankruptcy estate that might justify a non-debtor release cannot exist when the non-debtor is sued for its own independent tortious conduct. But that is precisely what Travelers seeks in this case. The Court of Appeals properly rejected that unprecedented expansion of bankruptcy court authority.

Rather than address that holding, Travelers distorts it, setting up and knocking down three erroneous straw-man arguments. *First*, Travelers argues that the Court of Appeals held that bankruptcy jurisdiction is solely *in rem*. *Second*, Travelers argues that the Court of Appeals held that state law trumps federal bankruptcy law in determining the proper scope of a non-debtor injunction. *Third*, Travelers argues that the Court of Appeals permitted a collateral attack on a decades-old judgment. Each of these assertions is demonstrably untrue. The Court of Appeals simply applied established principles to reject Travelers' request that it receive absolution for its own independent torts through Johns-Manville's bankruptcy. The Court of Appeals' judgment should be affirmed.

I. THE JOHNS-MANVILLE BANKRUPTCY AND THE 1986 INJUNCTIONS

Johns-Manville Corporation ("Manville") was for decades the country's leading manufacturer of asbestos-containing products and raw asbestos supplier. As a result, it faced a deluge of personal-injury and property-damage claims that led it to file for bankruptcy in 1982. Pet. App. 7a.

Maximizing the value of Manville's estate by preserving its "going-concern" value presented novel challenges. Because of the long latency period of asbestos-related diseases, many people who were exposed to Manville products were expected to manifest disease only after—potentially long after—confirmation of the Manville plan. Without addressing such "future claims," Manville's reorganization would have been doomed to failure. 11 U.S.C. § 1141(d)(1)(A), however, contemplates the discharge of a Chapter 11 debtor only for debts arising prior to the plan's confirmation date. And even if such "future claims" could be addressed under the Code, there remained the issue of how to provide notice to individuals currently unaware that they faced future illness.

The parties and the bankruptcy court devised a novel solution to this problem. The plan that was ultimately confirmed provided for the creation of a trust for payment of asbestos-related claims (the "Manville Trust"), to be funded with, among other assets, 80% of the common stock of reorganized Manville. Pet. App. 215a. To supplement the discharge provided by the Bankruptcy Code, the bankruptcy court entered an injunction barring the assertion of present and future asbestos-related claims against reorganized Manville and channeling

those claims to the Manville Trust. *Id.* 9a. To justify binding future claimants in this fashion, the court appointed a future claimants' representative to safeguard their interests.

The plan of reorganization and associated injunctions also fashioned unusual and novel protections for Manville's insurers. When Manville filed for bankruptcy, it was engaged in litigation with several of its insurers—including Petitioner Travelers Indemnity Company,[1] Manville's primary liability insurer from 1947 to 1976—over the scope of its insurance coverage. Pet. App. 8a-9a. In addition, certain asbestos plaintiffs had brought suit directly against Travelers and other Manville insurers seeking to recover from the proceeds of the Manville insurance policies for injury arising from exposure to Manville asbestos. *Id.* 133a-134a. Because Manville's liability insurance policies were among the most significant estate assets, resolving the insurance coverage dispute was a central part of the bankruptcy case. *Id.* 8a. Ultimately, Manville reached settlements with its insurers under which the insurers agreed to pay a total of about $770 million. *Id.* Of that amount, Travelers paid about $80 million. *Id.* 9a.

As part of the insurance settlement, the bankruptcy court entered an injunction barring the assertion against settling insurers of "Policy Claims," defined as "any and all claims ... (whether or not presently known) which have been, or could have been, or might be asserted by

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[1] Except where the context otherwise requires, references to "Travelers" are to Travelers Indemnity Company and its affiliates as they existed in 1986.

any Person against any or all members of the [Johns-Manville] Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies" issued by the settling insurers. Pet. App. 301a-302a. Instead, Policy Claims were channeled to the insurance Settlement Fund, which was then deposited into the Manville Trust pursuant to the Confirmation Order. *Id.* 308a-309a.

The scope of the injunction in favor of the insurers was a subject of considerable contention in the bankruptcy court. Opposing approval of the insurance settlement agreement, the Committee of Asbestos Related Litigants expressed concern that the proposed definition of Policy Claims "would not be limited to asbestos-related claims or even to claims related to policy proceeds," but could also bar claims involving "the Settling Insurers' own tortious and bad-faith misconduct in refusing to defend, settle and pay claims." 2d Cir. App. A-578-579.

In response, Manville expressly disclaimed any intention to cut off such claims in a March 1985 memorandum urging the bankruptcy court to approve Manville's settlement with Travelers: "By releasing its Insurers, Manville seeks only to uphold the most basic bankruptcy power—the power to enjoin third parties from enforcing their claims against property of the debtor itself once the property has been reduced to a cash fund and those claims have been channeled or transferred to that fund." Respondent's Joint Appendix ("Resp. JA") 1a-2a. Manville emphasized that, while the settlement agreement would bar lawsuits "derivative of Manville's rights under the policies," claims based on an insurer's own tortious conduct having "nothing to do

with the insurers' contractual liability to Manville" would remain unaffected. *Id.* 2a. Manville reiterated the point later in its memo:

> Manville does not seek to have this Court release its Settling Insurers from any claims by third parties based on the Insurer's own tortious misconduct towards the third party, as opposed to its misconduct towards Manville. Manville seeks only to release the Settling Insurers from the rights Manville might itself have had against them or rights derivative of Manville's rights under the policies being compromised and settled.

Id. 5a.

Ultimately, the parties resolved their dispute through a June 3, 1985 letter agreement "clarif[ying] the intent of the parties" to the insurance settlement agreement as to the intended scope of the insurance injunction. *Id.* 11a. The proponents of the settlement—including Travelers—agreed that:

> The Court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction. The channeling order is intended only to channel claims against the *res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (i.e., the Policies) which are or may be asserted against the Settling Insurers.

Id. 13a-14a. Travelers expressly confirmed that it shared that understanding, stating at the end of the letter: "The foregoing is confirmed on behalf of The Travelers

Indemnity Company on behalf of itself and each of its Affiliates." *Id.* 14a.

In December 1986, the bankruptcy court entered orders approving the insurance settlements, confirming the plan of reorganization, and entering the associated injunctions. Pet. App. 42a.

II. THE COURT OF APPEALS' 1988 RULING UPHOLDING THE INSURANCE INJUNCTION

In 1988, the Court of Appeals affirmed the order confirming the Manville plan. *See Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Separately, it upheld the validity of the injunction barring the assertion of Policy Claims against Manville's insurers—having construed the injunction as barring claims that "seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct." *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir. 1988) (Pet. App. 188a).

MacArthur Corporation, a Manville asbestos distributor, claimed to be a co-insured under the insurance policies involved in the settlement, pursuant to "vendor endorsements" in the policies entitling distributors to insurance coverage for claims arising from their sale of Manville products. Pet. App. 192a. MacArthur argued that the bankruptcy court lacked the authority to bar it from suing Manville's insurers to recover under those policies. *Id.* 193a. The Court of Appeals held that because MacArthur's rights were completely derivative of Manville's rights, and permitting MacArthur to assert claims against the insurance policies would deplete the assets of the bankruptcy estate, enjoining such claims

was within the bankruptcy court's power. *Id.* 197a-199a.

As the Court of Appeals explained, "Manville's insurance policies and their proceeds [are] 'substantial property of the Manville estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments.'" Pet. App. 196a. Applying that principle to MacArthur's claims, the court rejected MacArthur's argument that its interests were "separate and distinct" from Manville's rights under the policies. *Id.* 197a. Rather, the court held that:

> The vendor endorsements cover only those liabilities arising from the vendor's status as a distributor of Manville's products. The endorsements are limited by the product liability limits of the underlying Manville policies.... *MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured.* Such derivative rights are no different in this respect from those of the asbestos victims who have already been barred from asserting direct actions against the insurers.... *[I]n both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. In both cases, plaintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets.*

Id. 197a-198a (emphasis added).

The Court of Appeals reasoned that the bankruptcy court had the power to enjoin such claims as a corollary to the power expressly granted to it under the Bankruptcy Code to approve the sale of property of the debtor's estate "free and clear of any interest in such property of an entity other than the estate." Pet. App. 199a (citing 11 U.S.C. § 363(f)). A bankruptcy court may approve such a sale as long as the third party's claim is in *bona fide* dispute and its claim to the estate property is channeled to the proceeds of the sale. *Id.* Moreover, pursuant to Section 105(a) of the Bankruptcy Code, a bankruptcy court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title"—in this case, the bankruptcy court's authority to channel claims to estate property. *Id.* 200a (quoting 11 U.S.C. § 105(a)).

Although the insurance settlement was not precisely the same as the traditional sale of property of the estate free and clear of third-party claims, the *MacArthur* court recognized that the settlement could be analogized to a sale of the policies back to the insurer. In both cases, "the underlying principle of preserving the debtor's estate for the creditors and funneling claims to one proceeding in the bankruptcy court remains the same." Pet. App. 201a. Accordingly, the court held, the bankruptcy court's established power to preserve the *res* and adjudicate competing claims to the *res*—including the insurance policies and settlement proceeds—extended to enjoining claims that sought to recover out of the policy proceeds. *Id.*

III. THE 1994 MANVILLE AMENDMENTS TO THE BANKRUPTCY CODE

Placing the bulk of Manville's stock in the Manville Trust was intended to harness Manville's going-concern value to create an "evergreen" source of funding to pay asbestos claimants into the future. Pet. App. 215a-216a. As Senator Heflin later described it: "In essence, the reorganized company becomes the goose that lays the golden egg by remaining a viable operation and maximizing the trust's assets to pay claims." 140 Cong. Rec. S4521-01, S4523 (daily ed. Apr. 20, 1994). Reorganized Manville's stock price remained depressed, however, due to market concerns that the channeling injunction remained vulnerable to challenge. *See* H.R. Rep. No. 103-835 at 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3349.

Accordingly, in 1994 Congress enacted the "Manville Amendments," Sections 524(g) and 524(h) of the Bankruptcy Code. Section 524(h) approved the result in *Johns-Manville*. Section 524(g) expressly authorized using the Manville approach in future asbestos-related bankruptcies.

Because it enjoins the claims and limits the recovery of absent future claimants, a Section 524(g) channeling injunction is an extraordinary remedy. Its eligibility requirements are therefore strict: it is available only where a debtor "is likely to be subject to substantial future demands" that, absent an injunction, would threaten the ability "to deal equitably" with present and future claims. 11 U.S.C. § 524(g)(2)(B)(ii). For similar reasons, debtors may invoke Section 524(g) only if their plans meet "explicit requirements simulating those met in the Manville case." H.R. Rep. No. 103-835 at 41.

Among other things, the trust must be able to obtain a majority of the voting shares of the reorganized debtor, and the court must appoint a representative for the future claimants. 11 U.S.C. § 524(g)(2)(B).[2]

Prior to the enactment of Section 524(g), the Bankruptcy Code provided no express authority to enjoin claims against non-debtors. Section 524(g) codified this novel feature of the Manville bankruptcy as well, providing that where the statute's other requirements are met, the bankruptcy court may in certain narrow circumstances provide injunctive relief for non-debtors. This authority, however, was strictly circumscribed: such an injunction may bar only "action[s] directed against a third party who ... is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of" one of four specified relationships with the debtor, including "the third party's provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii).

Section 524(g) thus does not permit bankruptcy courts to bar any and all actions against a debtor's insurer, but only those suits seeking to hold the insurer directly or indirectly liable for the conduct of or claims against the debtor and that arise by reason of the insurer's provision of insurance to the debtor. In short, and unsurprisingly, Section 524(g) mirrors the reasoning of

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[2] Consistent with ordinary principles of finality, the statute provides that once the order confirming the plan of reorganization has been issued or affirmed by the district court and has become final, "the injunction shall be valid and enforceable and may not be revoked or modified by any court." 11 U.S.C. § 524(g)(3)(A)(i).

the Court of Appeals in upholding the original Manville insurance injunction in *MacArthur*, permitting a plan of reorganization to bar claims against non-debtor insurers only to the extent such claims seek to recover on account of the debtor's conduct and would thus risk reducing the debtor's insurance and depleting the estate.

IV. THE INDEPENDENT ACTIONS AGAINST TRAVELERS AND OTHER INSURERS

Beginning in 2001, asbestos plaintiffs' counsel developed new theories of liability for asbestos-related injuries. They began suing dozens of insurers, alleging, among other things, that the insurers had violated a purported duty to warn potential victims of the dangers of asbestos exposure. Although the parties and courts below referred to these lawsuits as "Direct Actions," that terminology is misleading. The suits are not traditional "direct action" suits, like those the Court of Appeals addressed in *MacArthur*, where a claimant sues an insurer directly to recover insurance proceeds allegedly due on account of an insured's tortious conduct. Pet. App. 5a n.4, 197a-199a. These new lawsuits (for clarity, referred to here as "Independent Actions") instead allege liability for insurers' own tortious misconduct—not that of any insured—and seek to recover from the insurers without regard to the terms or limits of any insurance policies.

The Independent Actions come in two basic forms, "Statutory Actions" and "Common-Law Actions." Statutory Actions are brought pursuant to state consumer-protection statutes. In essence, they assert that insurers conspired with one another and with their insureds to raise "fraudulent" defenses to asbestos-related personal-injury claims, which in turn led to the plaintiffs either

settling their claims too cheaply or being dissuaded from filing suit at all.

Travelers (Br. 17) identifies the *Wise* complaint, filed in West Virginia, as a "typical" Statutory Action. Notably, the *Wise* plaintiffs were not disappointed *Manville* claimants. Instead, they sought to represent a class consisting of claimants against three *other* asbestos defendants. 2d Cir. App. A-443-444. While the *Wise* complaint alleges that Travelers obtained knowledge of the hazards of asbestos in part from its relationship with Manville, the complaint does not seek to hold Travelers or any other defendant liable on account of its status as a Manville insurer. Rather, the complaint alleges that the insurer defendants breached independent legal duties to the plaintiffs by disseminating deceptive and misleading information in the course of their defense of other insureds. *See* Pet. App. 24a-25a.

The Common-Law Actions generally contend that insurers either failed to warn workers and the public about the hazards of asbestos, or conspired to suppress knowledge of those hazards, resulting in harm to the plaintiffs. They assert common-law theories of negligence, strict liability, breach of express and implied warranties, and fraudulent misrepresentation, among others. Pet App. 11a; *see, e.g.*, Compl., *Gilchrist* v. *American Std., Inc.* (Ohio Ct. Common Pleas No. 03-508628) (2d Cir. App. A-1443-1543). Again, while the complaints may allege that Travelers gained knowledge of the dangers of asbestos in part from its relationship with Manville, they do not seek to recover from the insurers on account of Manville's actions. Pet. App. 29a. Rather, the gravamen of the complaints is that the insurer defendants purportedly had a duty, independent of their rela-

tionship with any particular insured, to warn the public of the dangers of asbestos. *Id.*[3]

V. TRAVELERS' MOTION TO ENJOIN THE INDEPENDENT ACTIONS AND THE RESULTING SETTLEMENTS WITH THE PLAINTIFFS

In June 2002, Travelers moved the bankruptcy court to enjoin the Independent Actions, claiming that such lawsuits violated the 1986 confirmation order and the insurance injunction, which barred the assertion of Policy Claims—claims "based upon, arising out of or relating to" Manville's insurance policies—against settling Manville insurers. In contending that the Independent Actions asserted Policy Claims, Travelers pointed to the complaints' allegations that Travelers learned of the dangers of asbestos in part through its relationship with Manville.

The plaintiffs, unsurprisingly, contended that their lawsuits were not barred by the injunctions. But so did counsel for the beneficiaries of the Manville Trust, who disputed that the Independent Actions alleged prohibited "Policy Claims," pointing out that "[n]one of the instant lawsuits names Manville or the Manville Trust as a defendant; none of them sues Travelers for alleged misconduct in handling claims under Manville Policies; and

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[3] As the Court of Appeals noted (Pet. App. 25a n.21), no court has ever accepted these theories. Indeed, during the pendency of this appeal, the Ohio Court of Appeals rejected the Common-Law Action claimants' theories in *Bugg* v. *American Standard, Inc.*, 2005 WL 1245043 (Ohio Ct. App. May 26, 2005). As a result, all of the remaining Ohio Common-Law Actions, including the *Gilchrist* action, were dismissed.

none of them sues Travelers in its capacity as a Manville insurer." 2d Cir. App. A-721. Counsel also noted that if such claims did fall within the terms of the 1986 injunction, they would necessarily be channeled to the Manville Trust for payment, detrimentally affecting legitimate beneficiaries of the Trust. *Id.* A-728-730.

Without ruling on Travelers' motion, the bankruptcy court temporarily enjoined the Independent Actions and sent the parties to mediation. Pet. App. 12a, 103a. In 2004, Travelers entered into separate settlement agreements with the Statutory Action plaintiffs (Resp. JA 15a-39a), the Common-Law Action plaintiffs (*id.* 40a-60a), and a group of plaintiffs in Hawaii who were asserting liability arising solely from Travelers' handling of claims against a non-Manville insured, Combustion Engineering (*id.* 61a-81a). Under the settlement agreements, Travelers agreed to pay the claimants nearly $500 million, conditioned upon the entry of an order by the bankruptcy court "clarify[ing]" that the Independent Actions were and had always been prohibited by the 1986 injunctions.[4] *Id.* 23a, 48a, 69a. In addition to enjoining present claimants before the court—all of whom had already agreed to dismiss their pending suits and release their claims—the order Travelers sought would bar all *future* Independent Actions by parties not before the court.

The parties then moved the bankruptcy court to approve the various settlement agreements. The bankrupt-

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[4] The Independent Actions, however, would not be channeled to the Manville Trust, but instead to three new settlement funds to be created from the $500 million. Pet. App. 149a-152a.

cy court scheduled a hearing on the motions to approve settlements, and approved forms of settlement notice to be sent to potential Independent Action claimants. Resp. JA 82a-101a.

At this point, Chubb became a party to the proceedings. Chubb never insured Manville, and had not previously been a party to any proceedings in the Manville bankruptcy. But as a co-defendant with Travelers in certain Common-Law Actions, Chubb would be enjoined under the proposed Common-Law Action settlement from bringing potential contribution and indemnity claims against Travelers in the event Chubb were held liable on claims for which Travelers shared liability. Chubb accordingly filed a limited objection to the proposed Common-Law Action settlement.

In August 2004, after a hearing, the bankruptcy court approved the settlements. Pet. App. 187a. Adopting nearly verbatim the Travelers-drafted findings of fact and conclusions of law, the bankruptcy court reasoned that "the evidence ... establishes that the direct action claims against Travelers are inextricably intertwined with Travelers[']] long relationship as Manville's insurer." *Id.* 169a. Relying on that premise, the bankruptcy court "clarifie[d]" that all present and future Independent Actions "are—and always have been—permanently barred" by the 1986 injunctions.[5] *Id.* 170a. The bankruptcy court further held that all contribution or

[5] In light of its ruling, the Second Circuit found it unnecessary to address the bankruptcy court's problematic approval of a settlement bestowing an enormous reward upon parties premised upon their agreement to stop doing that which the bankruptcy court had just found to be a violation of its prior orders.

indemnity claims against Travelers in connection with the Independent Actions were likewise barred. *Id.* 93a-95a. Indeed, the bankruptcy court declared that all future claims "against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers[']' insurance relationship with Manville or Travelers[']' knowledge or alleged knowledge concerning the hazards of asbestos" were barred. *Id.* 95a.[6]

In addition, the bankruptcy court entered a "gatekeeping" provision requiring any plaintiff wishing to bring a suit against Travelers in state court "arising out of any policy of insurance provided by Travelers to a policyholder *other than Manville*" first to seek leave from the bankruptcy court. Pet. App. 97a (emphasis added). Plaintiffs were required to represent "that no allegations will be made [or] evidence ... introduced relating to exposure to Manville asbestos, Travelers[']' defense of Manville or Travelers[']' knowledge or alleged knowledge concerning the hazards of asbestos directly or indirectly arising out of its insurance relationship with Manville." *Id.* Plaintiffs would be permitted to proceed with their lawsuits only after obtaining an order "that the proposed ... action is not covered by" the 1986 injunction (as "clarified" in 2004). *Id.*

The district court largely affirmed the bankruptcy court's 2004 order approving the settlement agreements, but it vacated the "gatekeeper" provision as beyond the bankruptcy court's power, reasoning that "the Bankrupt-

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[6] The bankruptcy court also extended the protection of the injunctions for the first time to post-1986 affiliates of Travelers such as Citigroup.

cy Court has no jurisdiction to screen, in the first instance, suits against a non-debtor that purport to assert claims unrelated to the debtor or the estate." Pet. App. 181a.

VI. THE COURT OF APPEALS' DECISION

The Court of Appeals vacated the district court's order. It "conclude[d] that the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to the [plaintiffs], that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." Pet. App. 6a. It accordingly remanded to the bankruptcy court for that court to determine whether, in light of the Court of Appeals' decision, it had the authority to enjoin any of the claims at issue. *Id.* 36a.

The Court of Appeals noted that "the bankruptcy court had continuing jurisdiction to interpret and enforce its own orders." Pet. App. 17a. It explained, however, that "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction." *Id.* 18a. Accordingly, the Court of Appeals examined whether the bankruptcy court's "clarification" actually improperly expanded the scope of the 1986 injunctions to include claims that were beyond the bankruptcy court's power to bar.

In addressing that question, the Court of Appeals began with its 1988 decision in *MacArthur*. Pet. App. 21a-22a. The court explained that the bankruptcy court had the authority to enjoin MacArthur's claims because MacArthur's "rights as an insured vendor are completely

derivative of Manville's rights as the primary insured," and MacArthur sought "to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct." *Id.* (quoting *MacArthur*, 197a-198a). In short, "MacArthur's coverage claim clearly affected" "a significant asset of the bankruptcy estate—Manville's insurance policies." *Id.* 21a.

The Court of Appeals explained that, for similar reasons, the 1986 injunction properly barred "direct actions" by plaintiffs seeking to recover from Manville's insurers for Manville's tortious conduct. Pet. App. 22a-23a (citing *In re Davis*, 730 F.2d 176 (5th Cir. 1984)). Such "direct actions," the court noted, do not create an independent cause of action against the insurer, but "merely grant[] a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured." *Id.* 22a (citation omitted). Because such actions threatened to deplete the insurance coverage that was one of the Manville estate's most significant assets, the bankruptcy court had the power to enjoin them incident to its fundamental power to marshal estate assets and adjudicate competing claims to those assets. *See id.* 22a-23a.

The Court of Appeals explained, however, that "[t]he claims at issue in *MacArthur* and *Davis* differ significantly from the statutory and common law claims at issue here." Pet. App. 23a. Specifically:

> Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of

> Manville to be paid out of the proceeds of Manville's insurance policies. Moreover, the claims at issue here do not seek to collect on the basis of Manville's conduct. Instead, the Plaintiffs seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct.

Id. (citations omitted).

The Court of Appeals acknowledged that the bankruptcy court had found that the Independent Actions had a factual connection to the Travelers-Manville relationship, because Travelers obtained its knowledge about asbestos from its relationship with Manville. Pet. App. 23a. But, the court explained, in determining whether the bankruptcy court had the authority to enjoin the claims at issue, the pertinent question was whether the claims sought to recover for Manville's conduct, or sought to hold Travelers responsible for breach of an independent legal duty purportedly owed to the plaintiffs. *Id.* 24a. That question, the Court of Appeals noted, requires an examination of state law. *Id.* For example, the court noted that a West Virginia consumer-protection law permitted "a separate and independent recovery against [a] tortfeasor's insurer arising out of its alleged bad faith insurance practices," wholly distinct from any cause of action against the insured. *Id.* 24a-25a.

The Court of Appeals concluded that, insofar as the Independent Actions rested on such alleged independent state-law duties, and did not seek to hold Travelers liable for Manville's conduct or recover against the proceeds of the insurance policies or settlement, the bankruptcy court erred—as a matter of federal bankruptcy law—in extending the injunction to reach them. It recognized that injunctions in favor of non-debtors are

appropriate only in unusual circumstances: "[A] non-debtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." Pet. App. 30a (quoting *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005)). In light of this potential for abuse, and following the logic of *MacArthur* and *Davis*—which tethered the bankruptcy court's power to enjoin claims against non-debtors to its fundamental power to marshal estate assets and adjudicate competing claims to the estate—the Court of Appeals reasoned that, in this context, "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," here, the insurance policies and resulting insurance settlement proceeds. *Id.* 31a.

Accordingly, while the Court of Appeals expressly reaffirmed its holding in *MacArthur* affirming the 1986 insurance injunction, it declined to extend *MacArthur* to this very different situation: "Although the bankruptcy court had jurisdiction and authority to enter the 1986 orders barring claims 'based upon, arising out of, or related to the Policies,' it erred by subsequently interpreting those terms without reference to the court's jurisdictional limits." Pet. App. 31a. The Court of Appeals therefore vacated and remanded "for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims." *Id.* 36a.

SUMMARY OF ARGUMENT

I. This case concerns the limits of a bankruptcy court's power to enjoin claims asserted against a non-debtor. The Court of Appeals held that the bankruptcy court could not enjoin such claims where the non-debtor's alleged liability does not derive from the debtor's liability and the claims would have no effect on the bankruptcy estate.

That conclusion flows from well-established principles of bankruptcy law. The purpose of bankruptcy is to marshal the debtor's assets and to distribute them among creditors. Bankruptcy courts are able to bind all creditors because they exercise *in rem* jurisdiction over a limited fund—the bankruptcy estate. Bankruptcy courts lack such jurisdiction over the assets of non-debtors, who are not bound by the strictures of bankruptcy and whose creditors do not enjoy its protections. Accordingly, non-debtor injunctions are extraordinary relief, proper only when they are necessary to effectuate the specific provisions of the Bankruptcy Code governing creditor-debtor relations. As a long line of cases has made clear, it follows that bankruptcy courts may not enjoin claims against non-debtors when those claims do not derive from the debtor's liability and their assertion will not affect the bankruptcy estate. None of petitioners' contentions regarding the scope of bankruptcy jurisdiction or power calls that conclusion into doubt.

II. Travelers wrongly asserts that the Court of Appeals held, in derogation of the Supremacy Clause, that state law determines the limits of the bankruptcy court's authority to enjoin claims against a non-debtor. To the contrary, the Court of Appeals recognized that those limits are a question of federal law. At the same

time, in determining which state-law claims meet the federal-law standard, it is necessary to look to state law to ascertain the nature and elements of those claims. This Court has recognized, in cases stretching back over decades, that state law plays such a role in federal bankruptcy law. The Court of Appeals' ruling was a straightforward application of that settled principle.

III. Petitioners argue that respondents have raised an untimely "collateral attack" against the 1986 confirmation and insurance settlement orders and injunctions, and that the Court of Appeals' decision disregards principles of finality and upsets settled expectations. But respondents do not challenge any 1986 order; they instead oppose the bankruptcy court's 2004 order "clarifying"—in truth, rewriting—the scope of those injunctions. The Court of Appeals' decision was made on respondents' timely direct appeal from that 2004 order. Nor did the Court of Appeals "discard[] its own earlier affirmance of the Manville confirmation order," as Travelers claims (Br. 5). Rather, the Court of Appeals expressly reaffirmed its 1988 decision upholding the insurance injunction, but held that the bankruptcy court erred in expanding the injunction (in the guise of a "clarification") beyond established limits on the bankruptcy court's authority. That holding raises no legitimate finality concerns.

ARGUMENT

I. BANKRUPTCY COURTS LACK AUTHORITY TO ENJOIN CLAIMS AGAINST NON-DEBTOR THIRD PARTIES WHOSE LIABILITY IS INDEPENDENT OF THE DEBTOR'S

The Court of Appeals correctly held that the bankruptcy court lacked the authority to enjoin claims against Travelers for Travelers' own allegedly tortious conduct—claims that by definition could have no effect on the Manville estate. The fundamental purpose of bankruptcy is to exercise exclusive jurisdiction over the assets of the *debtor*, to resolve competing claims to those assets in a manner that binds all creditors (both present and absent), and, where appropriate, to discharge the debtor of pre-existing debts and enable it to obtain a fresh start. To that end, the Bankruptcy Code prescribes a detailed set of requirements to which debtors must adhere and a corresponding set of protections for creditors.

In extraordinary circumstances, courts have permitted the issuance of injunctions in favor of non-debtors in bankruptcy. Consistent with the fundamental purpose of bankruptcy, however, they have granted non-debtors this powerful protection only where their liability is linked to the debtor's and where assertion of claims against the non-debtor would thus threaten the ability to marshal the debtor's estate and apportion it equitably among creditors. The Court of Appeals' decision merely applied that basic principle, holding that Travelers was not entitled to an injunction that would immunize it from present and future liability for its own allegedly tortious conduct—liability wholly independent of Manville's. The assertion of such claims, by definition, can have no

effect on the bankruptcy estate, and enjoining them is thus outside the bankruptcy court's power.

Petitioners' arguments regarding the scope of the bankruptcy court's jurisdiction and authority provide no basis for questioning the Court of Appeals' holding. *First*, while it is true that bankruptcy courts' jurisdiction is not solely *in rem*, it does not follow that bankruptcy courts have authority to enjoin claims by third parties against non-debtors that have no effect on the *res*. *Second*, Travelers' contention that previous complex reorganizations could not have been achieved under the Court of Appeals' reasoning is demonstrably false: the Court of Appeals' decision is an entirely unremarkable application of the principles announced in the decisions approving those very reorganizations. *Finally*, under those same settled principles, whatever factual nexus may exist between the claims at issue and Travelers' insurance relationship with Manville is legally insufficient to justify the expansion of the injunction Travelers seeks.

A. The Fundamental Purpose Of Bankruptcy Is The Marshaling Of The Debtor's Estate And The Resolution Of Competing Claims To The Estate's Assets

Bankruptcy, at bottom, is about debtors, their property, and claims against that property. The question presented in this case is the extent of the bankruptcy court's power to enjoin claims that run not against debtors or their property but against non-debtors. That power lies at the outer limits of the bankruptcy courts' domain, and its scope must be defined by reference to the fundamental purposes and structure of bankruptcy law.

Bankruptcy's central purpose is to provide an orderly mechanism for addressing competing claims to the assets of a debtor who is unable to pay those claims in full. *See, e.g., Straton* 283 U.S. at 320-321 (the purpose of bankruptcy is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among creditors"); *see also United States* v. *Energy Res.*, 495 U.S. 545, 549 (1990) (the "traditional ... authority" of bankruptcy courts is "to modify creditor-debtor relationships"); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality) (the "restructuring of debtor-creditor relations ... is at the core of the federal bankruptcy power").

To accomplish the goals of bankruptcy, "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Hood*, 541 U.S. at 447; *see* 28 U.S.C. § 1334(e). The bankruptcy court adjudicates creditors' claims to the estate and the estate is apportioned equitably among those creditors according to the priorities set forth in the Bankruptcy Code. *See* 11 U.S.C. §§ 502, 506, 507, 725, 726, 1129. At the conclusion of a bankruptcy case, a debtor that has satisfied the Code's requirements is discharged of liability for old debts and given a "fresh start." The discharge constitutes a statutory permanent injunction against the assertion of pre-bankruptcy claims or any attempt to collect on pre-bankruptcy obligations. Hence, the debtor's existing creditors—whether or not they asserted a claim or made an appearance in the bankruptcy—are bound by the discharge and thereafter barred from pursuing the debtor or its future earnings and assets. *See id.* §§ 524(a), 727(a)-(b), 1141(d); *Hood*, 541 U.S. at 447; *see also Central Va. Comm.*

Coll. v. *Katz*, 546 U.S. 356, 363-364 (2006) (exercise of exclusive jurisdiction over debtor's property, equitable distribution of that property among debtor's creditors, and debtor's discharge and "fresh start" are "[c]ritical features of every bankruptcy proceeding").

A debtor may receive a discharge only after subjecting itself to rigorous requirements. Consistent with the bankruptcy court's exercise of *in rem* jurisdiction over the property of the estate, a debtor must give creditors broad notice of the bankruptcy proceeding; file detailed schedules disclosing its assets and liabilities; subject its financial condition and business affairs to scrutiny by creditors, a trustee, or a court-appointed examiner; and submit its assets and business operations to the jurisdiction and oversight of the bankruptcy court. 11 U.S.C. §§ 342, 521, 541, 1103, 1104, 1106, 1107; Fed. R. Bankr. P. 2002, 2004.

By the same token, because all creditors will be bound by the bankruptcy court's disposition of the *res*, the Bankruptcy Code provides detailed substantive and procedural protections for creditors. In a Chapter 11 reorganization like Manville's, creditors are entitled to negotiate with the debtor over the terms of the plan of reorganization by which estate assets will be apportioned among creditors, and, if dissatisfied, may propose an alternative plan. 11 U.S.C. §§ 1103, 1121. Creditors also have the express right to be heard on any issue in a bankruptcy case and to object to a proposed plan of reorganization. *Id.* §§ 1109(b), 1128. Creditors who will receive less than full payment under a plan have the right to vote on whether to approve the plan, after full disclosure of its provisions. *Id.* §§ 1124, 1125, 1126. The bankruptcy court cannot confirm a plan unless a

majority of creditors whose claims are impaired vote to approve it, *id.* §§ 1126, 1129(a)(8), or at least one class of impaired claimants approves the plan and the court concludes that the plan "does not discriminate unfairly" and is "fair and equitable" as to the remaining impaired creditors. *Id.* § 1129(a)(10), (b). Only if these protections are observed and the court confirms a plan satisfying all of the Code's requirements (*id.* § 1129(a)-(b)) does the debtor obtain a discharge. *Id.* § 1141(d).

As the overall structure of the Bankruptcy Code confirms, "[b]ankruptcy jurisdiction, at its core, is *in rem*." *Katz*, 546 U.S. at 995. The central problem of bankruptcy is how to apportion a limited fund among competing claimants. Bankruptcy courts' power, accordingly, centers on that fund—the *res*. "A bankruptcy court's *in rem* jurisdiction permits it to determin[e] all claims that anyone ... has to the property ... in question. The proceeding is one against the world." *Hood*, 541 U.S. at 448 (citation and internal quotation marks omitted). The court "is able to provide the debtor a fresh start ..., despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate." *Id.* at 447. In short, a bankruptcy court's statutory authority to grant a debtor a discharge—a permanent injunction against the assertion of all pre-bankruptcy claims—is inextricably tied to the court's power over the debtor's property: the *res* of the bankruptcy estate.

B. Bankruptcy Courts Have The Power To Enjoin Claims Against Non-Debtors Only If Such Claims Would Deplete The Bankruptcy *Estate Or Threaten The Debtor's Reorganization*

The Bankruptcy Code does not contemplate the grant of a discharge to non-debtors. Indeed, even where a non-debtor is co-liable with the debtor on a debt, the Code makes clear that a discharge of the debtor "does not affect the liability of any other entity on ... such debt." 11 U.S.C. § 524(e). Nor (except in the specific provisions of Section 524(g)) does the Code grant any express authority to enjoin claims against non-debtors.

These limitations on the reach of the bankruptcy power are understandable in light of the essential purpose of bankruptcy: to adjust the relations between a debtor and its creditors. The bankruptcy court's *in rem* jurisdiction does not extend to property of non-debtors. And, because non-debtors have not filed for bankruptcy, they are not subject to the strictures—and their creditors do not enjoy the protections—of the Bankruptcy Code.

In certain exceptional cases beginning with the pioneering Manville case, however, courts have found that a permanent injunction in favor of a non-debtor was essential to the debtor's effort to reorganize and address the claims of its creditors. In these rare cases, certain courts have held it permissible to issue such an ancillary injunction to effectuate the bankruptcy court's statutory

authority to protect the debtor's estate and ensure the equitable distribution of its assets among its creditors.[7]

In *Johns-Manville* itself, as discussed above, *see supra* pp. 3-7, Manville's insurers settled their coverage dispute with Manville, paying $770 million into a settlement fund. As part of the settlement, the bankruptcy court enjoined suits against the settling insurers "based upon, arising out of, or related to" the insurance policies, and channeling those suits to the settlement proceeds. Pet. App. 193a. Because the Bankruptcy Code provided no express authority for such a non-debtor injunction, the bankruptcy court relied upon Section 105, which authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. 11 U.S.C. § 105(a).

The Court of Appeals upheld the injunction, holding that the bankruptcy court "properly issued the [injunction] pursuant to its equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created." Pet. App. 194a. As the Court of Appeals explained, "a bankruptcy court has ju-

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[7] Relying on Section 524(e), two courts of appeals have concluded that such injunctions are impermissible under any circumstances. *See In re Lowenschuss*, 67 F.3d 1394, 1401-1402 (9th Cir. 1995) ("[Section] 524(e) precludes the bankruptcy courts from discharging the liabilities of non-debtors," and "the specific provisions of section 524 displace the court's equitable powers under section 105"); *In re Western Real Estate Fund*, 922 F.2d 592, 601-602 (10th Cir. 1991) (per curiam) (Section 105 does not grant power to "relieve[] the nondebtor from its own liability to the creditor" "in violation of section 524(e)").

risdiction over all of the property of the debtor's estate." *Id.* "Manville's insurance policies and their proceeds were 'substantial property of the Manville estate which [would] be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments.'" *Id.* 196a (citation omitted). The Court of Appeals noted that the Bankruptcy Code provides express authority to approve the sale of estate property free and clear of third-party claims and to channel such claims to the proceeds of the sale. *Id.* 199a (citing 11 U.S.C. § 363(f)). And it found the settlement here analogous, reasoning that "[t]he injunctive orders issued by the Bankruptcy Court were necessary to effectuate the Court's channeling authority, that is, to make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund." *Id.* The Court of Appeals thus approved the non-debtor injunction in favor of Manville's insurers only because the injunction was necessary to protect estate property—the insurance policies and proceeds—and ensure its equitable division among creditors.

Subsequent decisions have followed *Johns-Manville* in recognizing that non-debtor injunctions are extraordinary and permissible only when necessary to preserve the property of the estate and facilitate the equitable treatment of creditors. For example, in the bankruptcy of A.H. Robins Company—the manufacturer of the Dalkon Shield—the bankruptcy court enjoined suits by plaintiffs seeking to hold Robins' directors, attorneys, and insurer liable for Dalkon Shield injuries. *In re A.H. Robins Co.*, 880 F.2d 694, 700 (4th Cir. 1989). The Fourth Circuit upheld the injunction, reasoning that, if held liable, the non-debtors would have indemnity or

contribution claims against Robins, and that "the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor." *Id.* at 701-702. Accordingly, the bankruptcy court had the power under Section 105 to require the plaintiffs, whose claims were afforded full payment in the plan from proceeds of the debtor's insurance policies, "to resort to the fund that will not defeat other creditors," rather than "interfer[ing] with the reorganization and thus with all the other creditors" by pursuing separate actions against the directors, attorneys, and insurers. *Id.*

Similarly, in the bankruptcy of Drexel Burnham Lambert, the court approved a settlement of class-action securities claims against the debtor that enjoined plaintiffs in the non-opt-out class from asserting claims against the debtor's directors and officers. As the district court there explained, the settlement injunction protected the "[d]ebtors' estates from piecemeal dismemberment through claims over [against the debtor] and other indemnity claims" by the directors and officers. *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 928 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285, 293 (2d Cir. 1992).

The Third Circuit has likewise held that Section 105 does not grant bankruptcy courts the power to enjoin third-party actions against non-debtors that would not give rise to indemnity claims or other claims against the estate that would threaten the debtor's reorganization. *See In re Continental Airlines*, 203 F.3d 203, 214-217 (3d Cir. 2000). The court thus reversed confirmation of a plan that permanently enjoined shareholder lawsuits against the debtor's directors and officers for allegedly

causing the debtor to issue false statements in violation of securities laws. *Id.* at 205. The court explained that in the absence of any "identity of interests" between the debtor and the non-debtors necessitating an injunction of such claims to ensure the success of the debtor's reorganization, the injunction "amounted to nothing more than a lockstep discharge of non-debtor liability and fall[s] squarely into the section 524(e) prohibition." *Id.* at 217.

More recently, in the bankruptcy of Dow Corning Corporation, the largest producer of silicone breast implants, the bankruptcy court barred plaintiffs from suing Dow's shareholders and settling insurers on account of personal-injury claims against Dow. *See In re Dow Corning Corp.*, 280 F.3d 648, 654-655 (6th Cir. 2002). Reviewing and synthesizing the previous caselaw, the Sixth Circuit concluded that bankruptcy courts have the power under Section 105 to enjoin a non-consenting creditor's claim against a non-debtor only in the most "unusual circumstances." *Id.* at 658 (citing *Johns-Manville*, *A.H. Robins*, and *Drexel*). Such an injunction, the Sixth Circuit held, is permissible only when seven factors are satisfied. Specifically, among other factors, there must be "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate," and the injunction must be "essential to the reorganization" because the reorganization "hinges

on the debtor being free" from such indemnity or contribution claims. *Id.*[8]

The common thread in all these decisions is that a non-debtor injunction is permissible only when it is necessary to the debtor's reorganization because claims against the non-debtor would otherwise burden the debtor or threaten to diminish the debtor's estate. Under such circumstances, a non-debtor injunction may be authorized under Section 105 because the injunction is "necessary ... to carry out the provisions" of the Bankruptcy Code apportioning the debtor's assets equitably among creditors and granting the debtor a true discharge of existing debt.

That principle is also embodied in Section 524(g) of the Bankruptcy Code—the only provision that grants express authority to enjoin claims against non-debtors. As discussed above, *see supra* pp. 10-12, Congress modeled Section 524(g) after the Manville channeling injunction. Section 524(g) thus authorizes courts to provide injunctive relief to insurers and certain other non-debtors in narrow circumstances where, as in Manville, the non-debtors share an identity of interest with the debtor. Specifically, the statute permits such relief only for third parties who are "alleged to be directly or indirectly liable for the conduct of, claims against, or demands *on the debtor*"—not for third parties facing claims arising out of their own allegedly tortious con-

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[8] The Sixth Circuit further required that the plan provide "a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction" as well as "an opportunity for those claimants who choose not to settle to recover in full." *Id.*

duct. 11 U.S.C. § 524(g)(4)(A)(ii) (emphasis added). Moreover, the statute permits such an injunction only "*to the extent* such alleged [third-party] liability ... arises by reason of" one of four specified relationships with the debtor (including issuance of insurance to the debtor). *Id.* (emphasis added).[9]

Section 524(g) thus limits non-debtor injunctions to "derivative liability for the claims against the debtor." *In re Combustion Eng'g*, 391 F.3d 190, 234 (3d Cir. 2004). "As both the plain language of the statute and its legislative history make clear, § 524(g) provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor." *Id.* at 236. As the Court of Appeals here recognized (Pet. App. 34a-35a), the specific limitations Congress imposed on the issuance of non-debtor injunctions in Section 524(g)—limitations that derive from the fundamental structure and purposes of bankruptcy law—confirm that bankruptcy courts' interstitial power to issue such injunctions under Section 105 must be similarly constrained.

Indeed, that was the ultimate holding of *Combustion Engineering*, an asbestos-related bankruptcy in which the Third Circuit addressed a situation closely analogous to this case. There, two non-debtor affiliates of the debtor sought a permanent injunction of asbestos-related

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[9] The reward for insurers that satisfy Section 524(g)'s requirements is substantial. Although limited, as it must be, to debtor-derived liabilities, insurers enjoy the protection of a robust injunction prohibiting the pursuit of such claims, both present and future, against them.

claims against them arising out of their own independent tortious conduct, unrelated to the debtor's asbestos liability. The bankruptcy court held the injunction impermissible under Section 524(g), but concluded that it was necessary and appropriate under Section 105 because the corporate parent of the debtor and the affiliates had conditioned its substantial contribution to the asbestos trust on obtaining such relief. *Combustion Eng'g*, 391 F.3d at 210.

The Third Circuit flatly rejected this attempted end-run around the strictures of Section 524(g) and held that the bankruptcy court had no power to enjoin third-party claims against the non-debtor affiliates in the absence of any identity of interests between the debtor and the non-debtors. Because the complaints against the non-debtors "alleg[ed] independent liability, wholly separate from any liability involving [the debtor]," neither Section 524(g) nor Section 105 provided any authority for the injunction. *Combustion Eng'g*, 391 F.3d at 202, 235. As the Third Circuit explained, "[a]lthough some asbestos claimants ... may benefit from an augmented fund [contributed by the non-debtors], equity does not permit non-debtor affiliated entities to secure the benefits of Chapter 11 in contravention" of the Bankruptcy Code. *Id.* at 237. "[T]he practical effect of the § 105(a) injunction here is to extend bankruptcy relief to two non-debtor companies outside of bankruptcy," impermissibly allowing them "to cleanse themselves of non-derivative asbestos liability without enduring the rigors of bankruptcy." *Id.*

The Court of Appeals' decision here was nothing more than the unexceptional application of the same well-settled principles first articulated in *Johns-Manville*

itself, reaffirmed in the line of cases culminating in *Dow Corning* and *Combustion Engineering*, and codified in Section 524(g). As noted above, the Court of Appeals expressly reaffirmed its 1988 decision that the bankruptcy court had the power to enjoin claims against Manville's insurers that derived from Manville's conduct. Pet. App. 30a-31a. Here, by contrast, Travelers sought to enjoin claims against it that, whatever their ultimate merit, did not seek to hold Travelers derivatively liable for Manville's tortious conduct. Rather, as the Court of Appeals explained, at least some subset of the Independent Actions "seek to recover directly from [Travelers] for the insurer's own independent wrongdoing. Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate." Pet. App. 29a. Under established principles governing non-debtor injunctions, such claims—running between two non-debtors and having no effect on the bankruptcy estate—fall outside the bankruptcy court's power to enjoin.[10]

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[10] The Court of Appeals noted both that the claims against Travelers did not seek to recover from the *res* (the insurance policies and insurance settlement proceeds) and that they did not derive from Manville's conduct. In the insurance context, those two articulations of the limit on non-debtor injunctions are essentially synonymous. A typical general liability policy provides that the insurer will indemnify its insured for the insured's liability. An insurer's liability arising under its insurance policy thus derives from the debtor's liability. By contrast, insofar as an insurer allegedly breaches an independent duty running directly to a claimant, such a claim neither derives from the debtor's liability nor seeks to recover from the *res*.

Indeed, this case illustrates the dangers of non-debtor injunctions against which courts have repeatedly cautioned. "A nondebtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." *Metromedia*, 416 F.3d at 142. The original 1986 injunction in favor of Manville and its insurers was approved by Manville's creditors—those claimants injured by Manville—after a proceeding designed to protect those creditors' interests. No protection at all, however, was afforded to creditors of *Travelers* whose claims derive from Travelers' alleged independent tortious conduct—such as a claimant who was not exposed to a Manville product, but who claims that Travelers' breach of its state-law duties led her to accept an inadequate settlement from another asbestos defendant such as Combustion Engineering. Travelers did not comply with any of the stringent requirements and creditor protections the Bankruptcy Code imposes on debtors. Nor did it submit its business and assets to the *in rem* jurisdiction of the Bankruptcy Court that is the predicate for the discharge of claims against a debtor. *See Hood*, 541 U.S. at 447.

Similar concerns drove this Court's holding in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999). There, this Court disapproved a purported "limited fund" class-action settlement of asbestos claims under Federal Rule of Civil Procedure 23(b)(1)(B) because the settlement's proponents had failed to demonstrate that the fund available to pay the claims was truly limited. *See id.* at 848-853. *Ortiz* explained that the justification for binding absent plaintiffs to a limited-fund class-action settle-

ment—like the justification for binding creditors to a plan of reorganization—is that the total assets available to satisfy claims are limited, and it is necessary for one court to resolve all the claims to the fund in order to ensure its equitable distribution to claimants. *See id.* at 834-841. Where that necessity is not shown, absent claimants may not properly be bound. So too here: while Manville's present and future creditors could be bound to the Manville plan by virtue of the bankruptcy court's power to marshal Manville's limited assets and adjudicate all claims to those assets, that power cannot justify enjoining the assertion of claims against a *non-debtor* that would have no effect on the Manville estate.[11]

C. None Of Petitioners' Arguments Regarding The Scope Of The Bankruptcy Court's Jurisdiction Or Power Provides A Basis For Reversal

Petitioners' contrary arguments both distort the Court of Appeals' actual holding and fail to engage the established body of law set out above. Indeed, while criticizing the Court of Appeals' analysis, Travelers conspicuously fails to offer any legal principle at all by

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[11] The representational problems criticized by the Court from *Hansberry v. Lee*, 311 U.S. 32 (1940), to *Ortiz*, namely allowing present claimants to advantage themselves by trading away the rights of absent claimants whose interests they cannot be said to fairly represent, also are present here. As noted above, the main purpose of the 2004 "clarifying" order was not to bind the current claimants, who had already agreed to settle, concede their violations, and release their claims, in return for a substantial settlement, but rather to seek to bind absent claimants.

which to ascertain the scope of the bankruptcy courts' power to enjoin claims against non-debtors. None of its contentions (nor those of Common Law Settlement Counsel) provides any basis for questioning the Court of Appeals' judgment.

1. Travelers' primary argument for reversal is its contention that bankruptcy courts' subject-matter jurisdiction extends beyond "simple adjudications of rights in the *res*" to the issuance of "ancillary orders enforcing their *in rem* adjudications." Br. 23 (quoting *Katz*, 546 U.S. at 370). That is true, but irrelevant.

As discussed above, bankruptcy courts' jurisdiction "is principally *in rem* jurisdiction," and centers on the traditional bankruptcy purpose of protecting estate property and adjudicating competing claims to the *res*. *Katz*, 546 U.S. at 369; *Hood*, 541 U.S. at 448. In addition, as this Court recognized in *Katz*, bankruptcy jurisdiction may extend to certain ancillary disputes that go beyond the *res* itself, but that affect the overall debtor-creditor relationship. 546 U.S. at 370.

But that uncontroversial proposition sheds no light on the question presented here, which is the scope of the bankruptcy court's power to enjoin claims against *non-debtors*. The Court of Appeals did not hold that bankruptcy jurisdiction is solely *in rem*. Rather, it held that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." Pet. App. 31a. As demonstrated above, a well-established body of caselaw supports the conclusion that a bankruptcy court lacks the power to enjoin third-party claims against non-debtors that do not assert liability derivative of the debtor's and thus do not affect the *res* of the bankruptcy estate. Moreover, that

conclusion flows logically from the nature of bankruptcy itself: because bankruptcy is about debtors and their property, bankruptcy courts may not enjoin claims against non-debtors unless assertion of those claims would have some effect on the debtor's property.

Indeed, the language of the Bankruptcy Code mandates this conclusion. Contrary to Travelers' suggestion (Br. 24-25), bankruptcy courts are not free to take any action they deem to be in furtherance of equity. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988). Any residual equitable powers the bankruptcy courts possess are codified in Section 105 of the Code. *See United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008). And Section 105 is not a source of unbounded equitable authority to take any action the bankruptcy court deems desirable or to "create substantive rights that would otherwise be unavailable under the Bankruptcy Code." *Continental*, 203 F.3d at 211; *accord Metromedia*, 416 F.3d at 142. Rather, the power it grants is limited to actions that "carry out" and effectuate the specific "provisions" of the Bankruptcy Code, and thus "must derive ultimately from some other provision of the ... Code." *Metromedia*, 416 F.3d at 142 (quoting Baird, *Elements of Bankruptcy* 6 (3d ed. 2001)). Where an injunction does not further any specific provision of the Bankruptcy Code—and Travelers points to no such provision here—it is not authorized by Section 105.

Common Law Settlement Counsel assert a related, but distinct, objection to the Court of Appeals' analysis.

Notably, they do not argue that Section 105 permits a bankruptcy court to enjoin claims against non-debtors that do not affect the bankruptcy estate. Indeed, they approvingly cite (Br. 20) the seven-part test established by the *Dow Corning* decision—a test under which there can be no doubt that the injunction here would be impermissible. Instead, they merely contend that the Court of Appeals erred in framing its holding in terms of subject-matter jurisdiction, arguing that the question is more properly viewed as the scope of the bankruptcy court's statutory authority under Section 105.

That objection is semantic, not substantive. As this Court has observed, "jurisdiction is a word of many, perhaps too many, meanings." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006). The correctness of the Court of Appeals' judgment does not turn on whether its opinion used the term "jurisdiction" or "authority," but on whether bankruptcy courts have the power to issue injunctions like the one sought here. As demonstrated above, they do not.

In any event, whether or not the Court of Appeals was strictly correct in framing the issue in terms of subject-matter jurisdiction, it was unquestionably correct to inquire into the limits of the bankruptcy courts' subject-matter jurisdiction in analyzing whether the court had the power to enjoin claims against non-debtors.

It is undisputed that bankruptcy courts lack subject-matter jurisdiction to adjudicate claims between non-debtors—like the claims against Travelers at issue here—that do not affect the bankruptcy estate. Bankruptcy courts possess "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §

1334(b). That grant of jurisdiction is undeniably broad. But that broad jurisdiction is confined to issues affecting the debtor and its estate. It does *not* extend to the adjudication of disputes between non-debtors that would not "have an effect on the bankruptcy estate." *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 n.5 (1995); *see Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

The scope of the authority granted by the Bankruptcy Code to enjoin non-debtor claims must be informed by the limitations on the bankruptcy court's jurisdiction to adjudicate those same claims. Permitting bankruptcy courts to permanently enjoin claims that they had no jurisdiction to adjudicate would facilitate an end-run around the limitations Congress set on bankruptcy courts' jurisdiction. Accordingly, in determining the permissibility of non-debtor injunctions, various other courts, like the Court of Appeals here, have examined the scope of the "related to" jurisdiction to inform that inquiry and have concluded that a bankruptcy court may not enjoin claims falling outside that jurisdiction. *See Combustion Eng'g*, 391 F.3d at 224-233; *In re Zale Corp.*, 62 F.3d 746, 751-757 (5th Cir. 1995).

Petitioners' jurisdictional arguments—even if correct—thus provide no basis for reversing the Court of Appeals' judgment.

2. Travelers next contends (Br. 28-33) that the ability to enter non-debtor injunctions is critical to complex reorganizations such as mass-tort cases, and that the Court of Appeals' decision would unduly hinder such reorganizations. In support of that contention, it relies on three cases: *Drexel, A.H. Robins*, and *Dow Corning*. According to Travelers (Br. 32), "[n]one of the compre-

hensive reorganizations in these multi-faceted cases could have occurred under the Second Circuit's unprecedented theory of bankruptcy court jurisdiction."

As even a cursory examination of these cases makes clear, that is incorrect. As discussed above, in each of these three cases, the non-debtor injunction served to protect parties who were allegedly liable for claims against the debtor, so that a claim against the non-debtor would give rise to an indemnity or contribution claim that could deplete the debtor's estate. In *Drexel*, the non-debtor injunction protected the bankruptcy "estates from piecemeal dismemberment through ... indemnity claims" by the directors and officers. 130 B.R. at 928. In *A.H. Robins*, the Fourth Circuit approved the injunction because "the entire reorganization hinge[d] on the debtor being free from indirect claims such as suits against [the non-debtors protected by the injunction] who would have indemnity or contribution claims against the debtor." 880 F.2d at 702. And in *Dow Corning*, the Sixth Circuit held that non-debtor injunctions are *never* permissible unless there is "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate," and the reorganization "hinges on the debtor being free" from such indemnity or contribution claims. 280 F.3d at 658.

Far from demonstrating any flaws in reasoning, these decisions confirm that the Court of Appeals' holding was correct. As the Court of Appeals noted, "Travelers candidly admits" that the Independent Actions "seek damages from Travelers" that are "*unrelated* to the policy proceeds" that are estate assets, and "do not

seek to collect on the basis of Manville's conduct." Pet. App. 23a. The Independent Actions involve no "identity of interests" between Manville and Travelers and can have no effect on the Manville estate. There is accordingly no support for the injunction Travelers seeks in the decisions on which it relies.[12] Nor would application of the Court of Appeals' rule—which, in accord with basic bankruptcy principles, simply limits the scope of non-debtor relief to liability that is derivative of the deb-

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[12] The other cases cited by Travelers in the margin (Br. 32 n.7) likewise offer no support for the injunction entered here. In *Airadigm*, the Seventh Circuit agreed with the Court of Appeals here that a non-debtor release is not appropriate if it "affect[s] matters beyond the jurisdiction of the bankruptcy court or unrelated to the reorganization itself." *Airadigm*, 519 F.3d at 657 (citing *Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008)). In *Munford*, the Eleventh Circuit approved a settlement, outside the plan context, of the debtor's tort claims against a non-debtor defendant, which included a bar order enjoining non-settling co-defendants from asserting contribution or indemnity claims against the settling defendant. *In re Munford, Inc.*, 97 F.3d 449, 452, 455 (11th Cir. 1996). While the court mentioned Section 105, it relied principally on non-bankruptcy case law approving the limited use of such bar orders under Federal Rules of Civil Procedure 16 and 23. *See Munford*, 97 F.3d at 455 (citing *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493-494 (11th Cir. 1992)); *cf. U.S. Oil & Gas*, 967 F.2d at 496 n.5 (noting that "a settlement bar order cannot extinguish" "truly independent claims" against a non-settling defendant). Finally, *G.S.F.* involved a *consensual* release of a claim in a valid settlement between two non-debtors; the First Circuit there merely held that the bankruptcy court had "related to" jurisdiction to approve the settlement because the non-debtor defendant had asserted an indemnity claim against the debtor that could affect the estate. *In re G.S.F. Corp.*, 938 F.2d 1467, 1476, 1478-1479 (1st Cir. 1991).

tor's and can thus affect the estate—hinder complex reorganizations.

3. Finally, Travelers contends (Br. 34-36) that the Court of Appeals erroneously viewed the *res* of the bankruptcy estate as the dollar limits of the insurance policies, "draw[ing] a distinction between this res, on the one hand, and every other incident and component of the ... contractual ties between Travelers and Manville" on the other. Travelers argues that its contractual duty to defend Manville under the policies should also be viewed as part of the bankruptcy estate. And it appears to suggest that because the Independent Actions seek to hold Travelers liable for its conduct while defending Manville, they are therefore properly enjoined.

This argument suffers from two flaws. First, it misapprehends the reasoning of the Court of Appeals. When it referred to "policy proceeds," the Court of Appeals referred not only to the dollar limits of the policies, but to all of the insurance settlement proceeds that Manville received in exchange for releasing its contractual rights under the policies. The court did not draw a distinction between Manville's policy limits and its other rights under its insurance policies, or suggest that Manville's contractual right to have Travelers defend the suits against it was not part of the bankruptcy estate. Rather, the critical distinction the Court of Appeals properly drew was between claims alleging derivative liability—those that "seek to collect on the basis of Manville's conduct," "seek to recover insurance proceeds" or "rely on the insurance policies for recovery," Pet. App. 23a—and claims alleging breach of a purported "duty to the [Independent] Action Plaintiffs independent of [Travelers'] contractual obligations to

indemnify those injured by the tortious conduct of Manville," which seek to "recover directly from a debtor's insurer for the insurer's own independent wrongdoing." *Id.* 28a, 32a.

Second, as the Court of Appeals correctly held, even assuming the validity of all the bankruptcy court's factual findings in this regard, a mere factual nexus between the Independent Actions and Traveler's insurance relationship with Manville is insufficient to support the injunction. Rather, for the reasons discussed above, the relevant question is whether the Independent Actions are, in essence, suits against Manville or would otherwise deplete the Manville estate. The answer to that question, in turn, hinges not on whether the Independent Actions are based on facts involving Manville, but on whether as a legal matter Travelers' liability is derivative of Manville's. *Cf. Pacor*, 743 F.2d at 994 ("the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate" does not establish a relationship to the bankruptcy estate sufficient to give rise to bankruptcy jurisdiction).

Finally, it bears emphasis that, contrary to the implication of Travelers' brief, the Court of Appeals did not resolve the question whether any particular lawsuit among the Independent Actions could properly be enjoined. Rather, it merely articulated the proper legal test and remanded to the bankruptcy court "to examine whether" under that test, "it had jurisdiction to enjoin any of the instant claims." Pet. App. 36a. Accordingly, this Court may decline Travelers' invitation to engage in an exhaustive review of the facts underlying any particular complaint to determine whether it is properly en-

joined. Rather, this Court may limit its review to determining whether the rule of law announced by the Court of Appeals is correct, leaving application of the rule to the bankruptcy court in the first instance.

II. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THE SUPREMACY CLAUSE

Travelers' contention (Br. 40) that the Court of Appeals' decision violates the Supremacy Clause stems from its misapprehension of the court's holding and reasoning. When that misreading is corrected, Travelers' Supremacy Clause argument is revealed as wholly insubstantial.

Travelers contends (Br. 39) that the Court of Appeals erred by "holding that a final *federal* order can be circumvented because state law—not the federal court—determines the scope of the federal order." It similarly alleges (Br. 40) that the Court of Appeals "refused to enforce the injunction by its terms because (in the Second Circuit's view) enforcement 'risks ... displacing state courts.'" That description distorts the Court of Appeals' decision beyond recognition.

The Court of Appeals nowhere held that state law "determines the scope of [a] federal order." Rather, its decision rested on the unquestioned—and unquestionably correct—premise that *federal* law governs the nature and extent of the bankruptcy court's power to enjoin claims against a non-debtor. The Court of Appeals framed the issue as whether bankruptcy courts have the authority "to enjoin third-party non-debtor claims that [do not] directly affect the *res* of the bankruptcy estate" and do not derive from the conduct of the debtor. Pet. App. 31a; *see id.* 23a. In answering that question, the

court engaged in a lengthy analysis of federal bankruptcy law—including its prior decision in *MacArthur*, other courts of appeals' decisions addressing similar questions, and Section 524(g) of the Bankruptcy Code. *Id.* 21a-35a.

State law came into play in the Court of Appeals' analysis only because the Independent Actions that Travelers sought to have enjoined were *state-law* claims. Accordingly, as the Court of Appeals explained, it was necessary to look to state law in order to determine the nature of the claims.

That analysis in no way permits state law to trump federal bankruptcy law. It simply recognizes that state law supplies the legal rules governing state-law tort and consumer-protection actions. And the nature of those actions, in turn, determines whether a bankruptcy court may take the extraordinary step of enjoining them when they are asserted against a non-debtor. As the Court of Appeals explained, where state-law suits seek to hold a non-debtor liable for the debtor's actions, the bankruptcy court may do so in appropriate circumstances. Where, by contrast, such suits seek to hold a non-debtor liable for its own independent tortious conduct, the bankruptcy court may not enjoin them. That limitation on the scope of the bankruptcy court's authority is a rule of *federal* law.

That this analysis gives state law a limited role to play is entirely unremarkable. Notwithstanding Congress's plenary power over the area of bankruptcy, decades ago this Court held unanimously that "[p]roperty interests are created and defined by state law," and thus in a bankruptcy case it is state law that determines whether a creditor has a valid claim on assets of the es-

tate. *Butner* v. *United States*, 440 U.S. 48, 55 (1979). "[T]he 'basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" *Travelers Cas. & Sur. Co. of Am.* v. *PG&E*, 549 U.S. 443, 450-451 (2007) (quoting *Raleigh* v. *Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000)) (other internal quotation marks omitted); *see also Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946) ("What claims of creditors are valid and subsisting obligations against the bankrupt ... is a question which, in the absence of overruling federal law, is to be determined by reference to state law."). Particularly where, as here, the alleged property in question is a chose in action, reference to state or other applicable nonbankruptcy law is essential to understanding the contours of the rights at issue. The Court of Appeals' analysis here was a straightforward application of this basic bankruptcy principle, and it no more permits "Congress's constitutional authority ... [to] be overridden by state law" (Travelers Br. 40) than did this Court's ruling in *Butner* or any of the other cases cited above.

None of the three cases on which Travelers relies (Br. 40-42) calls into question the settled, commonsense principle that state law establishes the nature and validity of state-law claims adjudicated or otherwise affected in a bankruptcy case. Instead, each simply reaffirms the obvious proposition that federal law trumps state law in cases of actual conflict—a proposition that has no bearing here because there is no such conflict. In *Perez* v. *Campbell*, 402 U.S. 637 (1971), for example, an Arizona statute provided that even if an individual

received a discharge in bankruptcy, he or she could be penalized for not paying a debt that stemmed from an automobile accident. That law, this Court rightly concluded, conflicted with Congress's determination regarding the effect of a discharge in bankruptcy, and therefore had to yield. *Local Loan Co.* v. *Hunt*, 292 U.S. 234 (1934), is similar. There, this Court held that a debtor's assignment of his future wages to a creditor could not be enforced against him following his discharge in bankruptcy, notwithstanding Illinois law purporting to provide that an assignment of future wages is valid even after a discharge. *Id.* at 243-244.[13]

Here, by contrast, the state laws at issue merely establish the elements of the causes of action brought by the Independent Action plaintiffs. They do not purport to—nor do they in fact—conflict with any provision of federal law. And while the nature of the state-law claims is a question of state law, whether they may be enjoined is, as the Court of Appeals recognized, a question of federal law. The Court of Appeals' analysis—far from imposing "a newly-announced limitation on the application of the Supremacy Clause" (Travelers Br. 40)—thus breaks no new ground at all. It is entirely consistent with established principles of bankruptcy and with federal supremacy.

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[13] *Hanover National Bank* v. *Moyses*, 186 U.S. 181 (1902), likewise merely held that Congress may constitutionally provide for the discharge of state-law debt. That proposition—uncontroversial for at least the last century—has no bearing on any issue presented by this case.

III. The Court Of Appeals' Review, On Direct Appeal, Of The 2004 Clarification Order Raises No Issue Of Finality

Finally, petitioners argue that the Court of Appeals' decision undermines principles of finality and creates uncertainty in other cases involving similar confirmation orders or settlements. Travelers Br. 43-51; CLSC Br. 23-25. Like petitioners' Supremacy Clause argument, this argument rests on a false premise. Travelers accuses the Court of Appeals of "approaching the case as though it were a direct appeal of the 1986 confirmation order, ... discard[ing] its own decades-old affirmance of the Manville confirmation order" (Br. 5), and "rewriting the Manville confirmation order retroactively to give enterprising plaintiffs' lawyers an 'end run' around its core provision" (Br. 44). That is simply not so.

Far from "discarding" its previous decisions upholding the 1986 confirmation order and insurance injunction, the Court of Appeals expressly reaffirmed those decisions—but declined to extend them in the unprecedented way Travelers sought. Embracing the holding of its 1988 *MacArthur* decision, the Court of Appeals explained that "the bankruptcy court had jurisdiction and authority to enter the 1986 orders barring claims 'based upon, arising out of or related to the Policies.'" Pet. App. 30a-31a (citation omitted). And, as discussed above, the Court of Appeals reaffirmed *MacArthur*'s rationale for this conclusion: such an injunction was necessary to protect the insurance policies and proceeds that were valuable estate assets. The court thus in no way "discarded" its previous affirmance of the 1986 orders.

Indeed, the Court of Appeals was not reviewing the 1986 orders at all. Rather, it was reviewing the bankruptcy court's 2004 order approving the settlement agreements, in which Travelers paid $500 million in return for an order "clarifying" that the Independent Actions were barred by the 1986 injunctions. As the Court of Appeals explained, it was not the 1986 orders but the 2004 order that exceeded the scope of the bankruptcy court's authority: while "the bankruptcy court had jurisdiction and authority to enter the 1986 orders barring claims 'based upon, arising out of or related to the Policies,' it erred by subsequently interpreting those terms without reference to the court's jurisdictional limits." Pet. App. 30a-31a (citation omitted). That is, the bankruptcy court—in the guise of a "clarification"—improperly expanded the 1986 injunction to bar claims that the bankruptcy court could not lawfully enjoin.

Respondents thus did not bring a "collateral attack" on the 1986 orders, as petitioners claim. *E.g.*, Travelers' Br. 44. What respondents argued, and what the Court of Appeals held, is that the bankruptcy court improperly rewrote the confirmation order by extending the injunction to reach claims that it could not lawfully encompass. That order did not issue until 2004, and the Court of Appeals' decision was made on respondents' timely direct appeal from it. There is thus nothing "collateral" or belated about respondents' "attack."[14]

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[14] Indeed, petitioners' "collateral attack" argument is a brash rewriting of the history of this case. It was, after all, Travelers, not respondents, who initiated these proceedings in the bankruptcy court in 2002, creatively pointing to the Manville injunction as a defense to state-law suits seeking to hold it liable for its own al-

Petitioners cannot avoid this reality by saying that the bankruptcy court was merely enforcing and interpreting the 1986 orders. An interpretation of a prior order is a new legal ruling, and such a ruling is subject to review on direct appeal just like any other, irrespective of the age or "finality" of the earlier order. Were it otherwise, any time an order became final the issuing judge would be free, in the guise of "clarification," to revise it however he or she saw fit; any effort to oppose such revisions, no matter how belated or improper they were, would be deemed an impermissible "collateral attack." That is untenable. *See Louisiana Pub. Serv. Comm'n* v. *FERC*, 482 F.3d 510, 517 (D.C. Cir. 2007) ("If review were unavailable in these circumstances, then an 'agency [could] enter an ambiguous or obscure order, wilfully or otherwise, wait out the required time, then enter an "explanatory" order that would extinguish the review rights of parties prejudicially affected.'" (alteration in original) (citation omitted)).

Correcting petitioners' mischaracterization of the Court of Appeals' holding also makes clear that their supporting caselaw is inapposite. For example, Travelers (Br. 44-45) cites *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), in which a party argued that an earlier judicial decree was entirely invalid. Because that argument necessarily called into

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leged torts. And it was petitioners, not respondents, who later moved the bankruptcy court, as part of a $500 million settlement, to "clarify"—i.e., rewrite—the confirmation order so as to bar all of the Independent Actions and related indemnity/contribution claims (in an effort to bind absent and future claimants). Respondents simply opposed these improper efforts.

question the prior decree, which became final after not being appealed, this Court rejected the argument on the strength of *res judicata*. *See id.* at 375. Here, by contrast, there is no attack on the confirmation order itself, the analogue to the decree in *Chicot County*. Respondents, again, challenge only the clarification order's expansion of the injunction's scope, an expansion that was not previously approved by any court and is still on direct appeal. Likewise inapt is *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), in which this Court held that *res judicata* prohibited state courts from relitigating a jurisdictional question previously decided by a federal court, *see id.* at 171-172; *see also id.* at 172 (describing "a collateral attack" as one that "retries the issue previously determined"). The pertinent issue here—the validity of the 2004 clarification order—has not previously been litigated.

Yet another argument that crumbles once petitioners' false premise is recognized is that the Court of Appeals' decision here is in tension with 11 U.S.C. § 524(g)(3)(A)(i), which provides that channeling injunctions meeting certain conditions "may not be revoked or modified by any court except through appeal." Once again, respondents have not challenged the injunction itself, and the Court of Appeals neither "revoked [n]or modified" it. (Indeed, in respondents' view it was the bankruptcy court that did so in the "clarification" order.)

Travelers' assertion that the Court of Appeals' decision unfairly undermines injunctive protections on which it reasonably relied is equally unsound. Travelers claims to have assumed that the 1986 injunction would protect it from suits that seek to hold it liable not for

Manville's conduct, but for its own allegedly tortious actions, and that do not seek to recover from the assets of the bankruptcy estate. Travelers contends that it would not have agreed to the 1986 settlement had it known then that the injunction would not bar such claims. But that assertion is refuted by the record. As discussed above, Travelers expressly agreed and represented to the bankruptcy court in 1985 that "the injunction is intended only to restrain claims against the *res* (i.e., the Policies) which are or may be asserted against the Settling Insurers." 2d Cir. App. A-1118; *see supra* pp. 5-6. Indeed, if Travelers had always believed that the Independent Actions were barred by the 1986 injunction (entered as part of a settlement in which Travelers paid $80 million), it is curious that Travelers was willing to pay an additional $500 million to have the bankruptcy court "clarify" that the 1986 injunction covered such claims.

There is likewise no merit to Travelers' argument (Br. 49) that the Court of Appeals' decision upsets broader "societal reliance" on the Manville insurance injunction. Travelers appears to contend that parties in other cases have agreed to comparable settlements only because they assumed that the Manville injunction, and subsequent injunctions entered on that model, immunized non-debtors from their own independent tortious conduct. To the extent any party indeed made such an assumption, it had no foundation in the relevant decisions—including the Court of Appeals' 1988 decision in *Johns-Manville* itself. As to Travelers' related assertion (Br. 48) that the Court of Appeals' decision here imperils the finality of other settlements, that argument fails because it is based on the false premise that the Court of

Appeals invalidated or altered the confirmation order. As discussed above, the Court of Appeals simply barred an improper expansion of the injunction's scope. Thus, the only message that parties to other settlements could properly take away from the court's decision is that they will be protected from similar belated rewritings of their injunctions.

Past settlements aside, Travelers argues (Br. 48) that going forward the Court of Appeals' decision would "drastically ... reduce, if not eliminate," insurers' incentive to participate in such settlements, such that the creation of future Section 524(g) trusts will be more difficult. But Travelers never explains why insurers would not still be willing to enter into settlements in exchange for the protection that the Court of Appeals' decision here preserves for insurers, namely protection from liability based on their insurance policies or on the conduct of the insured. As Section 524(g) provides, bankruptcy courts can legitimately grant insurers and other third-party non-debtors injunctions barring actions against them that seek to hold them liable for the conduct of the debtor, to the extent that liability arises by reason of any of the statutorily enumerated relationships with the debtor. That there are limitations on the bankruptcy court's power to enjoin claims against third-party non-debtors does not mean that that power does not exist, that it is ineffective to facilitate reorganizations of asbestos defendants, or that it is insufficiently broad to induce

insurers to settle with such defendants.[15] The Court of Appeals' decision, which simply followed settled law in rejecting the extension of non-debtor injunctions to the non-debtor's own legally independent liability, in no way threatens existing trusts or the ability to resolve asbestos claims through such trusts in the future.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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February 25, 2009

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[15] In any event, if federal law does not give bankruptcy courts the power to enter injunctions like the one sought by Travelers, the fact that settlements may be more difficult as a result is irrelevant. Policy considerations cannot justify a judicial expansion of bankruptcy courts' authority beyond the limits Congress has set. *See, e.g., Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it." (internal quotation marks omitted)).

RESPONDENT'S BRIEF

Nos. 08-295, 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, ET AL.,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

COMMON LAW SETTLEMENT COUNSEL,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY, AND THE CASCINO ASBESTOS CLAIMANTS

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QUESTION PRESENTED

1. May a federal court, consistent with the limited bankruptcy subject-matter jurisdiction of 28 U.S.C. § 1334, enjoin independent state court actions against parties not in bankruptcy that: a) do not affect the *res* of the estate of a debtor in bankruptcy; b) do not in any way seek to impose legal obligations on the debtor; and c) do not assert claims derivative of claims against the debtor?

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, ET AL.,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

COMMON LAW SETTLEMENT COUNSEL,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY, AND THE CASCINO ASBESTOS CLAIMANTS

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory and constitutional provisions involved are set out in the Brief for the Travelers Petitioners,[1] with the conspicuous omission

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[1] The various Travelers entities will be referred to as "Travelers" hereafter. "App." refers to the Petitioners Appendix.

of 28 U.S.C. § 1334(b), which provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

STATEMENT OF THE CASE

At issue is the scope of the federal bankruptcy power to enjoin state law actions that do not affect the debtor's estate. Historically, the bankruptcy power has been limited to control over the debtor's estate and the ability to give the debtor a fresh start. Control over the estate has so dominated the bankruptcy landscape that the Court long ago recognized that "[p]roceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902). Other powers extending to the relation between creditors and the debtor are "ancillary" to the central concern over the estate. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 373 (2006). Accordingly "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion).

This case stands alone in the annals of bankruptcy cases before the Court in not involving the debtor or its assets in any form. Rather, the underlying dispute turns on the potential liability of Travelers—a nondebtor, not in bankruptcy—under various state laws for its own allegedly wrongful conduct. Either

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"Resp. J.A." is the Respondents' Joint Appendix. "2d Cir. App" refers to the joint appendix in the Second Circuit.

by statute or, at least putatively, by common law, a number of states appear to have recognized independent legal duties for insurers to disclose knowledge of ongoing hazards and to refrain from unfair insurance trade and settlement practices. Regardless whether any plaintiffs ever prevail in such actions against Travelers, the critical fact remains that those actions are brought against Travelers for its own alleged misconduct, not the conduct of its formerly-bankrupt insured, Johns-Manville. Any recovery would come from Travelers and would have no effect on Travelers' long-since settled contractual insurance obligations to Manville. The state law claims against Travelers are not derivative of the conduct of Manville, nor would any such claims touch the assets of the bankruptcy estate. Any claims against Manville are handled separately by the Manville Trust, whose funding was set in 1986 by confirmation of the Manville bankruptcy plan.

To date, none of the Respondents has filed suit against Travelers for its own alleged misconduct. Yet they have been enjoined from doing so even though their claims could have no possible bearing on the long-since consummated reorganization of Manville itself.

The use of the bankruptcy power to give this form of relief to a nondebtor is unprecedented. Since the Bankruptcy Code was amended in 1984, the Court has heard 54 cases involving interpretation or application of the bankruptcy statutes, and not one has arisen in a context that did not implicate the estate of the debtor. Nor have the Courts of Appeals recognized jurisdiction over any claim in bankruptcy other than those implicating the debtor itself or its

administrative ability to proceed in bankruptcy, or those that are derivative from the debtor's actions.

The gravamen of Respondents' argument is that the absence of any bankruptcy cases reaching independent state-law actions against nondebtors is not an artifact of the litigation history of particular cases, but reflects well-established jurisdictional limitations on the power of federal courts in bankruptcy. The sole source of bankruptcy jurisdiction is found in 28 U.S.C. § 1334, and its "related to" powers under subsection (b) have never been held to reach beyond matters affecting the debtor. As explained by then-Chief Judge Posner, "[S]ection 1334(b) cannot possibly be applicable to this dispute between two nonparties to the bankruptcy proceeding. Its domain is limited to questions that arise during the bankruptcy proceeding and concern the administration of the bankrupt estate, such as whether to discharge a debtor." *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994).

Of course, the enjoined state law claims against Travelers would be factually linked to its relationship to Manville, something the bankruptcy and district courts deemed sufficient for injunctive relief. But the question, however, is not whether there is a factual nexus, but whether that factual nexus is legally sufficient for bankruptcy court jurisdiction under § 1334. For the Second Circuit, the fact that claims against Travelers as Manville's insurer and claims against Travelers for its own independent wrongdoing arise "from a common nucleus of operative facts involving Travelers and Manville...is of little significance from a jurisdictional standpoint." App. 32a. The Second Circuit held there was no subject-matter jurisdiction over independent, non-derivative claims

against Travelers and remanded the case for a determination of which claims were derivative from the actions of the insured and which were independent claims against Travelers. Finding the jurisdictional divide to fall between derivative and independent claims is consistent with the Bankruptcy Code, with the Court's rulings on bankruptcy jurisdiction, and with case law from the Circuits. The opinion below should be affirmed.

1. Constitutional and Statutory Framework. The federal bankruptcy power derives from the Bankruptcy Clause of the Constitution, which gives Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST., art. I, § 8, cl. 4.

The modern statutory framework dates from the 1898 Bankruptcy Act, in which "federal district courts served as bankruptcy courts and employed a 'referee' system," *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982) (plurality opinion). That system proved incapable of handling the increase in consumer bankruptcies after the World War II period, and was replaced by the Bankruptcy Reform Act of 1978 (1978 Act), which created bankruptcy courts in each judicial district that served as adjuncts to the district courts. Bankruptcy Reform Act of 1978 § 201, Pub. L. No. 95-598, 92 Stat. 2549. The 1978 Act also extended district court jurisdiction to "all civil proceedings arising under title 11 or arising in or related to cases under title 11," *id.* § 241.

The Court held that granting jurisdiction over state-law claims to bankruptcy courts was unconstitutional in *Marathon Pipe Line*, 458 U.S. at 71. In response to *Marathon Pipe Line*, Congress passed the Bank-

ruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), which permitted district courts to refer "core proceedings" to bankruptcy courts. 28 U.S.C. § 157(b)(1). The district court also could refer "non-core matters" "related to" a case under title 11 to the bankruptcy court, and "any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." *Id.* § 157(c)(1). Despite the structural changes in the 1984 Act, Congress did not alter the jurisdictional grant to district courts from the 1978 Act, replicating the text verbatim. 28 U.S.C. § 1334(b).

Ten years later, Congress passed the Bankruptcy Reform Act of 1994 (1994 Act). Section 524(g) of the 1994 Act created distinct procedures for relieving a debtor of future asbestos liability in bankruptcies involving significant present and future asbestos claims, which included a heightened standard for obtaining the approval of asbestos claimants. This provision codified the procedures used in the Johns-Manville reorganization, in which a federal court established a trust to assume liability for both present and future asbestos-related claims against the debtor. 140 CONG. REC. 27,692 (1994) (statement of Rep. Brooks). Section 524(g) effectuated this goal by allowing a channeling injunction to redirect all claims for asbestos personal injuries from the debtor to the newly-created bankruptcy trust. The channeling injunction could also apply to claims that were derivative of the debtor's liabilities for asbestos exposure, including claims against a debtor's insurance policy. More specifically, § 524(g), in stating the general rule in § 524(e) that the discharge of the

debtor "does not affect the liability of any other entity on ... such debt," included a provision "nothwitstanding" § 524(e) for relief for a third party who is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of the third party's provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii)(III). Notably, § 524(g) *did not* include any additional grant of jurisdiction to federal courts and § 1334(b) remains the lone grant conferring jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." Thus, § 524(g) still reaches only liability "for the conduct of, claims against, or demands on the debtor."

2. *Factual Background.* Although the opinion below is captioned, *In re Johns-Manville Corporation,* App. 1a, this case involves neither Johns-Manville, a former bankrupt, nor the Manville Trust, a trust created to assume the asbestos liabilities of Johns-Manville in a manner now codified as 11 U.S.C. § 524(g). Rather, the case concerns the efforts of Manville's insurer to eradicate its own independent liabilities under various state laws under the rubric of the Manville Bankruptcy.

a. The Manville Bankruptcy. Travelers served as one of Manville's primary insurers for many years and contributed approximately $80 million into the creation of the 1986 Manville bankruptcy trust, obtaining in exchange a "full and final release of Manville-related claims." App. 9a. In total, Manville settled with all its insurance carriers for more than $700 million, which formed a significant part of the initial corpus of the Manville Trust. App. 213a-215a.

The original settlement in 1986 required that all "Policy Claims" be channeled into a bankruptcy trust that would assume all of Manville's asbestos liabilities, App. 297a, including claims against Travelers under its insurance policies. App. 445a. In its Order of December 18, 1986 (the "Settlement Approval Order"), which was incorporated into the Confirmation Order, the bankruptcy court described the "Policy Claims" that would be referred to the Trust:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

App. 439a. The confirmation of the Manville plan, which is not at issue in this case, was subsequently affirmed by the Second Circuit. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988).

In addition to channeling the Policy Claims into the Manville Trust, the bankruptcy court also enjoined any new actions against the Settling Insurance Companies "for the purpose of, directly or indirectly, collecting, recovering or, receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation," other than those to enforce rights or obligations under the Reorganization Plan. App. 286a.

Even at the time of the original settlement, the bankruptcy court's orders distinguished between claims brought on the policies and those brought directly against the insurers for their own miscon-

duct. For example, with regard to claims filed prior to 1986, the bankruptcy court limited its injunction to exclude claims of "*bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims.*" App. 446a (emphasis added).

The distinction between claims derivative of Manville's liability and those arising from independent conduct of the insurer was consistent with the underlying settlement between Manville and its insurers as to the scope of the insurance contribution to the proposed Manville estate. This is set out clearly in a June 3, 1985 letter written by Lowell Gordon Harriss of Davis Polk & Wardwell, counsel for Manville, and sent to and confirmed by Peter Schlesinger of Simpson Thacher & Bartlett, counsel for Travelers. Resp. J.A. 11a. In that letter, the parties clarify the scope of the negotiated channeling injunction under the July 18, 1984 Settlement Agreement. The critical passage provides:

> The Court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction. *The channeling order is intended only to channel claims against the res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (*i.e.*, the Policies) which are or may be asserted against the Settling Insurers.

Resp. J.A. 13a-14a. (emphasis added). Travelers thereby directly accepted the limited scope of its bankruptcy release in the channeling order.

b. Current Claims Against Travelers. Many years after the bankruptcy court issued its 1986 Confirmation Order approving the settlement of Manville's

bankruptcy, various lawsuits were filed against Travelers. These suits alleged that Travelers was an independent tortfeasor, liable under state law for its own conduct independent of its insurance policies to Manville. In each of these lawsuits, the plaintiffs sought damages from Travelers' independent funds, not from Manville's insurance policy or from the Trust. *See* App. 10a-11a, 35a.

Although these actions were termed "Direct Actions," that term is misleading. Unlike direct actions that permit a tort claimant to sue the insurer directly without naming the insured, these are not suits to collect on the insurance policies. As the Second Circuit noted, a direct action by a tort claimant seeks recovery from the insurer under the policy, App. 5a n.4, while these actions "seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct." App. 23a.

The new claims fall into two basic categories. The first were "based on statutory regulation of insurance practices," and alleged that "Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices," App. 44a, and that Travelers fraudulently coordinated a national effort to defend asbestos litigation through the "state of the art" defense. *See* App. 10a & n.10. For instance, in *Wise v. Travelers Indemnity Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001), App. 24a, the plaintiffs alleged, *inter alia*, that the insurance companies willfully misrepresented facts relating to the insurance coverage at issue. This conduct, plaintiffs alleged, constitutes a violation of W.V. CODE § 33-11-1 et seq., prohibiting unfair methods of competition and unfair or deceptive acts

or practices, for which there are independent sources of liability. 2d Cir. App. A-521-24.

The second category of claims involved plaintiffs who alleged that Travelers violated common law duties by failing to disclose its knowledge of asbestos hazards and that such knowledge was suppressed as a result of a conspiracy between Travelers and Manville. App. 11a. *Darden v. Combustion Engineering, Inc.*, No. 02-04150-B (117th Dist. Ct., Nueces County, Tex., Dec. 8, 2003), 2d Cir. App. A-1264, presents an example of the common law suits. The Darden plaintiffs alleged three causes of action against the insurance company defendants, including Travelers. The plaintiffs alleged that the insurance defendants had an independent duty to protect plaintiffs from the dangers of asbestos and violated that duty, *see* 2d Cir. App. A-1337-42; that the insurance defendants had fraudulently conspired to conceal information about the danger of asbestos, *see* 2d Cir. App. A-1337-42; and that the insurance defendants had acted in concert to misrepresent information about the danger of asbestos, *see* 2d Cir. App. A-1342-43.

Travelers ultimately agreed to settle both the statutory and common law claims for over $400 million. App. 150a-152a. There are two noteworthy features of this settlement. First, the money was not to be paid into the Manville Trust, such that the remedy was never intended to be part of the bankruptcy estate. *Id.* Instead, the money was to be paid into special funds for the current statutory claimants and unspecified common law claimants. *Id.* Second, notwithstanding the fact that the settlement provided a compensation order only for current claimants, the settlement was conditioned on the

bankruptcy court entering a "Clarifying Order" expanding its twenty-year-old confirmation order to bar future claims against Travelers. App. 152a; *see also* App. 13a-14a.

The bankruptcy court accommodated Travelers and entered a sweeping injunction that would cover all future claims against Travelers bearing any connection to asbestos:

> The commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

App. 95a. The predicate for the bankruptcy court's action was not that the enjoined claims were related to attempts to collect for liabilities derived from Manville's conduct, but that those claims were "related to" Travelers' status as Manville's insurer. *See* App. 169a et seq. ("[T]he direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer.").

In its evaluation of whether the claims were "related to" the insurance policies, the bankruptcy court asserted a "duty to look to the body of *facts* alleged—and not to the labels or legal theories—to ascertain whether a given claim has been settled, dismissed or enjoined," citing Second Circuit cases referring to tests for *res judicata*. App. 183a. The injunction's broad sweep was based on the bankruptcy court's prediction "that insurers would not contribute funds without receiving assurance that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." App. 170a-171a.

Included in the injunction are the current Respondents, none of whom have filed suit against Travelers and none of whom stands to recover from the settlement that was obtained by bartering away their interests. The Asbestos Personal Injury Plaintiffs are six asbestos personal injury claimants: Shirley Melvin for the Estate of Joyce Myers; Pearlie Bailey for the Estate of James Bailey; Lee Fletcher Anthony and General Lee Cole, each a claimant against the Manville Trust; and Robert Alvin Griffin and Vernon Warnell, who have claims against the Manville Trust that they have not yet submitted. The Cascino Asbestos Claimants are approximately 5,632 common law asbestos claimants from Illinois, Indiana, Wisconsin, and Texas, all of whom have settled claims against the Manville Trust but have filed no independent actions against Travelers. *See* 2d. Cir. App. A-60 (Docket No. 3652; ex. A).

Respondents appealed to the district court on the grounds that the bankruptcy court did not have jurisdiction over claims not affecting the estate of the bankrupt or the debtor. The district court rejected

the argument that there was no federal subject-matter jurisdiction because the claims fell outside § 1334(b); instead, it ruled that the bankruptcy court need not have "related to" jurisdiction under § 1334(b). *See* App. 52a. The court upheld the sweeping anti-suit injunction, resting jurisdiction not on any statutory grant but on the bankruptcy court "enforcing its own Orders" and thereby having jurisdiction derivative of its original jurisdiction. App. 52a-53a.

c. *The Second Circuit Opinion.* The Second Circuit unanimously reversed the district court. The court, per Judge Wesley, focused directly on the question of the source of federal subject-matter jurisdiction:

> [W]hile there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction. Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed statutory and common law claims.

App. 18a. The appeals court held that § 1334(b) could not serve as the jurisdictional predicate for enjoining state-law actions that asserted independent claims against Travelers that were distinct from any claims derivative of liability of its insured, Manville. App. 28a-29a. Although the bankruptcy court would have "jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," App. 31a, the Second Circuit concluded that jurisdiction did not extend to claims that "seek to recover directly from Travelers for its own alleged misconduct." App. 35a.

The Second Circuit found that "the nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law." App. 23a-24a. The bankruptcy and district courts had not examined the nature of the state-law actions because each had assumed that any factual nexus to Travelers having served as Manville's insurer was sufficient to confer jurisdiction for the challenged injunction. App. 23a. Despite an incomplete record below, the appellate panel examined the substance of the state law causes of action to determine the source of the duties owed by Travelers to the plaintiffs and concluded that at least some claims sounded in an independent duty. App. 24a-26a.

For example, under West Virginia law, the court noted, the "settlement of the underlying tort case against the tortfeasor does not preclude a separate and independent recovery against the tortfeasor's insurer arising out of its alleged bad faith insurance practices." App. 25a. Such actions "raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate." App. 29a. As a result, "[t]he bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers." *Id.*

The Second Circuit consequently remanded the matter for the Bankruptcy Court to determine which claims were derivative of claims against Manville that had been discharged in bankruptcy—and could therefore be enjoined—and which were independent actions under state law. App. 35a-36a. Rather than awaiting disposition on remand, Petitioners sought review by certiorari.

SUMMARY OF ARGUMENT

This is a case about subject-matter jurisdiction. As the Second Circuit held, the bankruptcy court and district court had no subject-matter jurisdiction over the state claims that they enjoined.

The lower federal courts are "creatures of statute." *Bath County v. Amy*, 80 U.S. (13 Wall.) 244, 247-48 (1871). Their jurisdictional authority must have a statutory basis, "which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). That statutory limitation is all the more important when a bankruptcy court, acting as a delegate of the federal court's authority, attempts, as here, preclusively to preempt state-law causes of action.

Bankruptcy jurisdiction is defined by 28 U.S.C. § 1334. The Court has interpreted that statute to confer upon federal courts jurisdiction over claims that involve a debtor or a debtor's estate. However, the dispute below concerns neither the property of a debtor—the "core" of a bankruptcy discharge—nor the obligations of the debtor, nor the debtor-creditor relationship, so as to fall within the "related to" jurisdiction under § 1334(b). Under the pertinent statute and the Court's precedents, there is simply no statutory authorization for federal courts to exercise bankruptcy jurisdiction over claims against a nondebtor, such as Travelers, that do not affect either a debtor or the debtor's estate. This is confirmed not only by the Court's interpretation of the statute but by hundreds of years of experience with bankruptcy and insolvencies which, in turn, confine the federal Bankruptcy Power under the Constitution to the affairs of debtors and their estates.

The bankruptcy and district courts below claimed the ability to create their own ancillary jurisdiction based upon prior orders of the bankruptcy court. The Court has repeatedly—most recently in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002)—rejected such claims of inherent federal court jurisdictional authority based on equitable powers. Ancillary authority flows from a statutory grant of jurisdiction; it does not supplant the need for such a grant.

At bottom, the underlying dispute is not about the Manville bankruptcy at all. Rather, this case concerns the attempt of a nondebtor to turn to the Manville bankruptcy court to enjoin state court litigation making no claims on Manville. In exchange for a lump-sum payment to a finite group of claimants that already had filed suits, Travelers sought a one-time fix to any potential liabilities for all claims bearing any factual nexus to asbestos. Unfortunately for Travelers, the bankruptcy power does not include what may be likened to a sale of indulgences to nondebtors, even at a high price. The Court struck down similar attempts to buy wholesale litigational peace in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), each time protecting unrepresented parties against broad claims of the need for finality. Such a trade-off is equally impermissible whether it is run through the Bankruptcy Code or through a Rule 23 class action as in *Amchem* and *Ortiz*.

Accordingly, the Second Circuit properly vacated and remanded to determine which claims might implicate the debtor or derive from the debtor's liability and which do not. On remand, the bankruptcy court would limit its review to those claims

over which it could properly assert jurisdiction. That order was correct and should be affirmed.

ARGUMENT

I. THE BANKRUPTCY SUBJECT-MATTER JURISDICTION OF FEDERAL COURTS IS LIMITED BY STATUTE UNDER 28 U.S.C. SECTION 1334.

A. SECTION 1334 IS THE EXCLUSIVE GRANT OF SUBJECT-MATTER JURISDICTION FOR BANKRUPTCY CASES.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Bankruptcy courts are no exception: "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

The contemporary grant of subject-matter jurisdiction over bankruptcy represents a careful effort to respect the limits of bankruptcy jurisdiction over state law claims as required by the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In that case, the Court held that the adjudication in a non-Article III bankruptcy court of a contract dispute brought by a debtor directly against a creditor violated Article III. *Id.* at 87-88. The plurality observed, "[t]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private

rights, such as the right to recover contract damages that is at issue in this case." *Id.* at 71 (opinion of Brennan, J.).

Following *Marathon*, Congress enacted 28 U.S.C. § 1334 to create bankruptcy jurisdiction in the District Courts and 28 U.S.C. § 157 to permit referral of most bankruptcy matters to the bankruptcy courts; *see also* 10 COLLIER ON BANKRUPTCY ¶ 7012.10[3], p. 7012-20 (15th ed. rev. 2006) ("Subject matter jurisdiction over bankruptcy cases is provided for in 28 U.S.C. § 1334."). Section 1334 reads in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) [T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11....
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
> > (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate....

This grant of jurisdiction accomplishes two important tasks. First, it assures that the District Court hearing a case has exclusive jurisdiction over the *res* at the heart of bankruptcy proceedings, namely the "property...of the debtor." *Id.* § 1334(e)(1). Second, it confers upon the federal courts jurisdiction over the restructuring of debtor-creditor relationships under title 11 (*i.e.*, "cases under title 11"). This includes

jurisdiction over adversarial proceedings arising during the bankruptcy, whether such proceedings are part of the restructuring itself (*i.e.*, "arising under title 11") or implicate either the corpus of the estate or the debtor-creditor relationship (*i.e.*, "arising in or related to cases under title 11").[2] *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161 (7th Cir. 1994) (Posner, J.) ("The reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract, and other legal claims by and against the debtor, claims that, were it not for bankruptcy, would be ordinary stand-alone lawsuits between the debtor and others....").

At the heart of any bankruptcy proceeding is the orderly distribution of the debtor's estate, which has led the Court to understand bankruptcy jurisdiction as "principally *in rem*." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006). This is a constant throughout the history of bankruptcy jurisdiction. The primary question in any bankruptcy case since the 1898 Act has been the appropriate allocation of the *res* of the bankrupt estate amongst the various claimants to the *res* (*i.e.*, creditors). *See generally* 1 COLLIER, *supra*, ¶ 1.01[1][a], p. 1-7 to 1-9 ("The Bankruptcy Act of 1898 established the modern concepts of debtor-creditor relations in providing a well-structured system for liquidation and distribution of a bankrupt's estate, while permitting an honest debtor a discharge from debts.").

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[2] Complementing § 1334, bankruptcy powers are divided between "core" and "non-core" proceedings under 28 U.S.C. § 157. This section permits bankruptcy courts to hear core proceedings concerning the bankrupt estate proper. In non-core matters, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for *de novo* review.

Accordingly, the Second Circuit, in remanding the present case to determine which claims derive from obligations of the debtor's estate, rightly concluded that any orders of the bankruptcy court "must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate." App. 33a. This holding is perfectly in keeping with the Court's recognition that a bankruptcy court's jurisdiction "is premised on the debtor and his estate, and not on the creditors." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); *see also Katz*, 546 U.S. at 372 ("A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.").

But, the issue of whether a court has jurisdiction over the parties or property subject to suit (*i.e.*, *in personam* or *in rem* jurisdiction) is distinct from and cannot be confused with the separate question whether the category of claim in suit falls within the limited subject-matter jurisdiction of the federal courts. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982). The former "flows not from Art. III, but from the Due Process Clause" and "recognizes and protects an individual liberty interest," while the latter "is an Art. III as well as a statutory requirement" and "functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.* at 702. "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). *See also United States v. Morton*, 467 U.S. 822,

828 (1984) ("Subject-matter jurisdiction defines the court's authority to hear a given type of case, whereas personal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum."); *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 701 (1982) ("The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements"); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1063 (3d ed. 2002) ("The concepts of subject matter jurisdiction and venue should be distinguished from the principle that the court must have jurisdiction over the defendant's person, his property, or the res that is the subject of the suit.").

It is striking that in its Brief, Travelers does not address the question of subject-matter jurisdiction at all, despite the holding of the Second Circuit that "the district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate." App. 35a-36a. Travelers instead appears distracted by the inquiry of the Second Circuit as to the impact of any potential claim against Travelers on the Manville estate. The inquiry below is hardly surprising given that the animating concern of bankruptcy law is precisely the distribution of the *res*, and that the impact on the *res* in turn defines the subject-matter jurisdiction of a court in bankruptcy.

As a practical matter, the *res* does typically mark the outer bounds of a case or controversy in bank-

ruptcy. Thus, none of the 54 bankruptcy cases adjudicated by the Court since the passage of the 1984 Act extended bankruptcy jurisdiction to suits involving third-party nondebtors that do not affect the debtor or the bankruptcy estate.[3] Bluntly put, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." *Celotex*, 514 U.S. at 308 n. 6. *See also Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 40-41 (1991) (finding that Congress has vested bankruptcy courts with only "limited authority" where allegedly related action was unlikely to affect "jurisdiction over the property of the estate").

Contrary to Travelers' contentions, the Second Circuit ruling did not "revisit the propriety and scope of the confirmation order nearly a quarter century after the fact."[4] Br. at 44. Whatever may happen in state courts between Travelers and individual plaintiffs will have no bearing on Manville's discharge from bankruptcy or on the corpus of the estate, the critical elements of a confirmation order. Any finding of liability as to third parties would not "reopen" the confirmation proceeding, or call into question either the injunction granted in the confirmation order or the release of Travelers by Manville. Instead, the ruling by the Second Circuit recognizes that a confirmation does not (and cannot) release third

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[3] A list of the 54 cases is produced as the Appendix to this Brief.

[4] Petitioner Travelers and amici Resolute Management Inc. incorrectly characterize the appeal from the bankruptcy court's decision as a "collateral attack" on federal subject-matter jurisdiction. Respondents did not challenge the bankruptcy court's 1986 order which did not purport to restain them; rather, they directly appealed the 2004 Clarifying Order that expressly barred them from filing suit against Travelers. App. 41a.

parties who are not themselves subject to a bankruptcy discharge. *See Zerand-Bernal Group,* 23 F.3d at 163; *Underhill v. Royal,* 769 F.2d 1426, 1432 (9th Cir. 1985); 8 COLLIER, *supra*, ¶ 1141.02[4][a], pp. 1141-11 to 1141-13 (summarizing case law as holding that a "reorganization plan simply cannot release third parties and that such a provision in a plan is unenforceable in an action against a codebtor that does not itself receive a bankruptcy discharge").

In trying to demonstrate "the importance of bankruptcy court authority beyond the confines of a res," Travelers cites three cases that are supposedly analogous to the instant case. Br. at 29-33.; *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989). But none of these cases supports an extension of subject-matter jurisdiction beyond the debtor-creditor relationship.

All three cases turned critically on "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." *Dow Corning*, 280 F.3d at 657-58; *see also Drexel*, 960 F.2d at 293; *A.H. Robins*, 880 F.2d at 701. Thus, for example in *Drexel,* the district court justified enjoining claims against directors and officers as a way of ensuring "protection of the Debtors' estates from piecemeal dismemberment through claims over and other indemnity claims." *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 928 (S.D.N.Y. 1991).

The Second Circuit correctly found no such danger of dissipation of the assets of the Manville estate here

since the claims at issue "constitute independent tort actions." App. 25a. Manville's assets have already largely been distributed in bankruptcy to its creditors many years ago, save for the remaining funds in the Manville Trust. Travelers has failed to cite any case, either from the Court or in any Circuit, where a nondebtor has been covered by a channeling injunction in the absence of some impact on the debtor's estate.

B. THE "RELATED TO" JURISDICTION OF § 1334 DOES NOT ENCOMPASS ACTIONS UNCONNECTED TO THE BANKRUPTCY ESTATE.

Although Travelers does not address the jurisdictional basis for the challenged injunction, the "related to" provisions of § 1334(b) do not confer jurisdiction on the bankruptcy court to enjoin claims against insurers because of violations of their independent duties not derivative of claims against the debtors. The widely accepted test for whether a federal court can exercise "related to" jurisdiction was laid out in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and the Court, and all Circuit courts, have consistently applied this test to limit jurisdiction to claims affecting the bankrupt's estate. As set out by the Third Circuit, the critical question is,

> whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*.... An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994 (emphasis in original; citations omitted).

Pacor draws an important jurisdictional line between claims that directly affect the debtor's estate and matters that happen to overlap factually with the bankruptcy. At issue in *Pacor* was the attempt of Pacor, a nondebtor defendant in an asbestos products liability suit, to remove the matter to federal court on the basis of a potential impleader claim against Johns-Manville, a party in bankruptcy. The Third Circuit remanded the third-party nondebtor suit against Pacor to the Pennsylvania state court because the suit "could not determine any rights, liabilities, or course of action of the debtor." *Id.* at 995. It held that "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate" did not suffice to afford jurisdiction over the independent state law claim. *Id.* at 994. Absent a direct claim against the estate, the bankruptcy power could not extend to independent state-law actions not affecting the debtor.

In *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), the Court adopted the Third Circuit's demarcation of the reach of bankruptcy subject-matter jurisdiction:

> We agree with the views expressed by the Court of Appeals [in *Pacor*] that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate".... We also agree with that court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless. (citing *Pacor*, 743 F.2d at 994).

Applying the *Pacor* test, the Court in *Celotex* found a bonded obligation of a debtor in bankruptcy to

be within the "related to" jurisdiction of § 1334(b) because immediate execution on the bond would have "a *direct and substantial* adverse effect on Celotex's ability to undergo a successful reorganization." *Id.* at 310 (emphasis added). In *Celotex*, the claims stemmed from a tort judgment *against the debtor*, and had the judgment creditors executed on the supersedeas bond, the sureties of that bond then would inevitably have attempted to exercise their contractual right to reach the debtor's assets.[5]

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[5] Travelers' exaggerated reading of *Katz* to reach beyond the *res* cannot withstand scrutiny. *Katz* involved whether to extend the *in rem* exception to sovereign immunity. However, the fact that the Court in *Katz* held that the immunity exception did extend to actions ancillary to the *res* does not in any way mean that the Court has held that any and all ancillary actions satisfy the jurisdictional definition of a bankruptcy under § 1334(b). On the contrary, the Court in *Celotex* affirmed the *Pacor* test for bankruptcy jurisdiction which limits jurisdiction to actions that affect "the debtor's rights, liabilities, options, or freedom of action." *Pacor*, 743 F.2d at 994.

In fact, *Katz* itself reinforces that jurisdictional definition. First, the Court held that "the subject of Bankruptcies" extended to ancillary actions only "in certain limited respects." 546 U.S. at 370. Second, the habeas actions the Court found important in the 1800 Bankruptcy Act quite literally affected the freedom of the debtor, *see id.* at 374-75—an analog to the fact that "bankruptcies were, in some cases, punishable with death by the laws of England." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (quoting Roger Sherman at the Constitutional Convention). Third, *Katz*, like all 54 cases the Court has considered under the 1984 Act, *see* Appendix *infra*, involved the debtor-creditor relationship because it concerned an action by a debtor to recover a preferential transfer from a creditor. Conversely, in this case, Travelers asks for an injunction barring suits that would not at all affect the legal status of the relationship between Manville and its creditors.

As the Court further noted in *Celotex,* all of the Circuit courts, with slight variation, have adopted the *Pacor* test. *Id.* at 308 n.6. Most recently, Chief Judge Scirica, in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), further refined *Pacor* in the context of an asbestos bankruptcy under § 524(g). The court there struck down a bankruptcy plan that would have immunized third parties from claims of independent liability: "§ 524(g) did not authorize a channeling injunction over the independent, non-derivative third-party actions against non-debtors...." *Id.* at 233. Or, as the Fifth Circuit expressed in a similar case:

> [A] third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy.

In re Zale Corp., 62 F.3d 746, 753 (5th Cir. 1995); *see also Belcufine v. Aloe*, 112 F.3d 633, 636 (3d Cir. 1997) (applying *Pacor* and finding "related to" jurisdiction under § 1334(b) where "claims can have an effect on a bankruptcy estate").

Combustion Engineering expressly rejected the argument—advanced by both Petitioners here, as well as certain amici—that the scope of a bankruptcy court's jurisdiction could be expanded by third-party contributions to the estate: "If that were true, a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions." *Combustion Eng'g*, 391 F.3d at 228. To the contrary, as the Third Circuit recognized,

jurisdiction is conferred by statutory authority, not by agreement, "even in a plan of reorganization." *Id.* (quoting *In re Resorts Int'l, Inc.*, 372 F.3d 154, 161 (3d Cir. 2004)). Consequently, subject-matter jurisdiction does not exist over non-bankruptcy controversies with third parties "who are otherwise strangers to the civil proceeding and to the parent bankruptcy." *Pacor*, 743 F.2d at 994.

The Second Circuit in this case relied upon *Combustion Engineering* to conclude that "global finality is only as 'global' as the bankruptcy court's jurisdiction. A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions." App. 30a. The court below concluded in turn that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." App. 31a. That application of "related to" subject-matter jurisdiction is entirely consistent with *Celotex* and its adoption of the *Pacor* test.

Grounding "related to" jurisdiction in a manifest impact on the debtor's estate brings coherence to the reach of subject-matter jurisdiction under the Bankruptcy Code. It is impossible to read statutory language without regard to the underlying purposes of a statute. *See, e.g., Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) ("We have held that a state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The same rule of construction should apply for bankruptcy jurisdiction under § 1334(b).

C. SECTION 524(g) OF THE BANKRUPTCY CODE IS NOT A JURISDICTIONAL GRANT, NOR DOES IT GIVE THE DISTRICT COURT POWER TO ENJOIN THE CLAIMS AGAINST TRAVELERS.

Section 524(g) of the Bankruptcy Code, which Congress passed as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, authorizes "a court that enters an order confirming a plan of reorganization" to issue "an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section." 11 U.S.C. § 524(g)(1)(A). The purpose of an injunction under § 524(g) is to channel "asbestos-related claims to a personal injury trust [which] relieves the debtor of the uncertainty of future asbestos liabilities." *In re Combustion Eng'g*, 391 F.3d 190, 234 (3d Cir. 2004).

Yet nowhere in § 524(g) does the statute expand the jurisdiction of the federal courts in general or with regard to insurers. The pertinent section of the statute, § 524(g)(4)(A)(ii)(III), permits injunctions directed against third parties "alleged to be *directly or indirectly liable* for the conduct of, claims against, or demands on *the debtor*" and only then, "to the extent such alleged liability of such third party arises by reason of the third party's provision of insurance to the debtor or a related party." This language clearly states that actions against a third-party insurer who is not a debtor or creditor are only barred if the claims being enjoined are derivative of the liability of the debtor (being "directly or indirectly liable for the conduct of, claims against, or demands on the debtor") for which the third party provides insurance ("by reason of the ... provision of insurance

to the debtor"). No court has ever read the creation of a channeling injunction through § 524(g) to provide an independent source of jurisdiction beyond the scope of § 1334.[6]

Nor can the term "indirectly" be stretched to grant jurisdiction beyond any connection to the debtor or the estate.[7] The underlying state-law claims in this matter all stem from Travelers' allegedly having violated a duty owed to Respondents; they have

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[6] Courts have also uniformly refused to read a jurisdictional grant into 11 U.S.C. § 105(a), which provides that a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." As held by Judge Wallace, "[p]ower under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction." *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 624 (9th Cir. 1989); *see also In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 n.13 (6th Cir. 1991) ("[E]ven were we to view this case solely as a proceeding to obtain an order pursuant to section 105(a), the power of the bankruptcy and district courts to hear this case is limited to the grant of jurisdiction in 28 U.S.C. § 1334.").

[7] Neither Petitioners nor amici Future Claims Representatives even address the issue whether the statutory requirements of § 524(g) would allow the injunction at issue here. Even third-party claims that can be enjoined require that at least 75 percent of claimants whose claims are to be addressed by the trust must vote in favor of the plan, § 524(g)(2)(B)(ii)(IV)(bb), and that extinguished future interests be presented for acceptance to "a legal representative [appointed] for the purpose of protecting the rights of persons that might subsequently assert demands of such kind," § 524(g)(4)(B)(i). Neither of these requirements was met here and the bankruptcy court record does not indicate any vote of approval by creditors nor any participation by a futures claims representative. *See* App. 150a (noting that "each such settlement was 'the product of good faith, arms-length negotiations' among the parties").

nothing to do with "the conduct of, claims against, or demands on the debtor," Manville.

Finally, the legislative history of § 524(g) does not evince any congressional intent to expand the scope of federal bankruptcy subject-matter jurisdiction. In his discussion of § 524(g), the sponsor of the 1994 Act in the House of Representatives, Representative Brooks, specifically referred to the object of the legislation as granting the full range of equitable power—not jurisdiction—to a court in bankruptcy. 140 CONG. REC. 27,692 (1994) (expressing "no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable *powers* to issue an enforceable injunction of this kind" (emphasis added)). *See also* H.R. REP. NO. 103-835 (1994); 140 CONG. REC. 27,678-27,700, 28,355-28,359 (1994). This is entirely consistent with the object of § 524(g) to channel asbestos claims into a special trust, not to alter the grant of bankruptcy jurisdiction under § 1334(b). As explained by Senator Heflin,

> *[T]his statutory affirmation of the court's existing injunctive authority* is designed to help asbestos victims receive maximum value. It does so by assuring investors, lenders, and employees that *the reorganized debtor* has indeed emerged from Chapter 11 free and clear of all asbestos-related liabilities other than those defined in the confirmed plan of reorganization, and that all asbestos-related claims and demands must be made against the court-approved trust. This added certainty will ensure that the full value of such a trust's assets—the securities upon which it relies in order to generate resources to pay asbestos claims—can be realized.

140 CONG. REC. 28,358 (1994) (statement of Sen. Heflin) (emphasis added). Congress knew how to expand the jurisdiction of the bankruptcy courts if it intended to do so. For example, as part of the 1994 Bankruptcy Reform Act, Congress did amend a jurisdictional provision, 28 U.S.C. § 158, to add district court jurisdiction over interlocutory orders and decrees issued under 11 U.S.C. § 1121(d).

D. THE BANKRUPTCY COURT'S INHERENT POWER TO INTERPRET ITS OWN ORDERS CANNOT CONFER SUBJECT-MATTER JURISDICTION OVER CLAIMS NOT RELATED TO A BANKRUPTCY ACTION.

What then is the claimed source of subject-matter jurisdiction over the independent state law actions? Travelers chooses not to address the question of subject-matter jurisdiction at all. The Common Law Settlement Counsel Petitioners claim that because there was jurisdiction over the confirmation proceeding, "there was no reason for the Second Circuit to consider whether it also had jurisdiction over the Direct Actions." Br. at 11. Each Petitioner claims that once a court's equitable powers are invoked, that alone may suffice for federal court intervention. Neither confronts the long-established principle that "[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938).

Like the Petitioners here, the courts below were unable to identify any statutory source of jurisdiction for the injunctive orders. The bankruptcy court assumed that, once having issued an order concerning Manville, it could claim jurisdiction based upon

the statutory authorization of injunctive decrees and "the Court's inherent power to interpret and enforce its own orders." App. 162a. In its view, no specific statutory conferral of jurisdiction was needed because "the Court is enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction." App. 163a.

The district court stated that it did not need to find "related to" jurisdiction in order to issue the injunctions. App. 52a. Instead, the district court, like the bankruptcy court, rested jurisdiction on the bankruptcy court's own prior orders, *id.*, and on the need to induce Travelers to contribute to the deal: "It is reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville Plan." App. 57a.

However, like Antaeus, the giant of Greek mythology who lost power when not in contact with the Earth, federal courts cannot summon injunctive powers without their jurisdictional tethers. A court that would claim to base its ancillary jurisdiction on its injunctive decrees "must demonstrate that *original subject-matter jurisdiction* lies in [that court]." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (emphasis added). *Syngenta* concerned the All Writs Act, which also authorizes federal courts "to issue such commands...as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). But the principle articulated in *Syngenta* extends much further than merely to the All Writs

Act setting and applies whenever courts purport to find inherent authority based upon judicial decree. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Mere pragmatic necessity, whether to obtain consent for a settlement, as in *Syngenta*, or to obtain funds for a newly-created bankruptcy trust, cannot create jurisdiction. There was no dispute in *Syngenta* that "ancillary enforcement jurisdiction was necessary" under the facts of that case in order to vest settlement authority, through removal, in the federal court. 537 U.S. at 34. Rather, the Court rested its holding on the simple fact that jurisdiction is a creature of statute: "[I]nvocation of ancillary jurisdiction...does not dispense with the need for compliance with statutory requirements." *Id.*

That outcome is even more compelling in the current circumstances where a bankruptcy court was supervising a settlement outside the control of the bankruptcy process altogether. In this case, there was not even a claim that funds were being obtained for a bankruptcy trust, and in fact no funds were to be paid to the Manville Trust. App. 152a. Consistent with *Syngenta,* the Second Circuit likewise recognized the limitations of necessity: "The bankruptcy court's desire to facilitate global finality for Travelers may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists." App. 36a.

Travelers' reliance on *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) is also misplaced. In *Hunt*, the creditor had made a claim directly against the post-discharge wages of the debtor, *id.* at 238, thereby undermining a core function of bankruptcy in giving the debtor a fresh start. A court in that situation would have "jurisdiction over a supplemental and

ancillary bill to enjoin a creditor, after adjudication and discharge of the bankrupt, from prosecuting his claim in a state court." *Pepper v. Litton*, 308 U.S. 295, 304 n. 11 (1939) (citing *Hunt*, 292 U.S. at 240). *Hunt* does not address the question of the jurisdictional basis of an injunction that has nothing to do with the debtor or the debtor's estate. To the contrary, *Syngenta* illustrates the principle that "a 'court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims.' Ancillary jurisdiction, therefore, *cannot provide the original jurisdiction*...." *Syngenta*, 537 U.S. at 34 (quoting *Peacock v. Thomas*, 516 U.S. 349, 355 (1996)) (emphasis added).

Accordingly, the Second Circuit properly reversed an injunction that had no connection to either the debtor in bankruptcy or the estate of the debtor. Without such a connection to the subject matter of bankruptcy, the bankruptcy court could not create its own jurisdiction by piggybacking off of its own injunctions. The bankruptcy court turned to itself as authority for the proposition that bankruptcy courts have inherent and ancillary jurisdiction once they have entered injunctions. App. 161a. That proposition cannot survive *Syngenta*.

II. CONGRESS'S POWER UNDER THE BANKRUPTCY CLAUSE DOES NOT REACH BEYOND THE ORDERLY DISPOSITION OF A DEBTOR'S ESTATE AND THE RESOLUTION OF DEBTOR-CREDITOR DISPUTES.

A. "THE SUBJECT OF BANKRUPTCIES" AT THE TIME OF THE CONVENTION WAS LIMITED TO THE DEBTOR-CREDITOR RELATIONSHIP, AND CONGRESS HAS NOT EXCEEDED THAT LIMIT

Congress derives its power to enact bankruptcy laws solely from the Bankruptcy Clause, U.S. CONST. Art. I, § 8, cl. 4, which gives it the power "[t]o establish...uniform Laws on the subject of Bankruptcies throughout the United States." The Framers adopted this language against the background of English bankruptcy laws going back to 1542, 34 & 35 Hen. 8, ch. 4 (1542-43) (Eng.), and 1570, 13 Eliz., ch. 7 (1570) (Eng.), which had defined their "subject" exclusively as proceedings affecting debtors. These laws simply did not touch parties outside the debtor-creditor relationship. Though only creditors could commence bankruptcy proceedings, those proceedings nevertheless were concerned exclusively with proceedings against debtors whom the statutes treated as "quasi-criminals." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7-8 (1995). In fact, the very existence of a bankruptcy depended on a debtor because creditors could petition the Lord Chancellor to appoint bankruptcy "commissioners" only after a merchant debtor committed an act of bankruptcy indicating he could not pay his debts. 13 Eliz., ch. 7,

§ 2. Parties outside the debtor-creditor relationship had no part in the process.

The English bankruptcy laws in effect at the time of the Constitutional Convention likewise reached no further than the affairs of the debtor. Bankruptcy law remained exclusively debtor-related under the 1705 Statute of Anne, 4 Anne, ch. 17 (1705) (Eng.), which enacted a dual regime that remained in effect through the drafting of the Constitution. *See* 5 Geo. 2, ch. 30 (1732). On the one hand, for the first time, the statute allowed bankruptcy commissioners to discharge cooperating debtors with the consent of their creditors, *see* 4 Anne, ch. 17, § 7, and allowed cooperating debtors to claim an allowance exempt from the bankruptcy state. *See* 5 Geo. 2, ch. 30, § 7; 4 Anne, ch. 17, §§ 7-8. On the other hand, however, the 1705 statute punished fraudulent debtors with the death penalty, *see* 4 Anne, ch. 17, §§ 1, 18, inaugurating strong protections against fraud in connection with bankruptcy that continue today in the form of a fraud exception to discharge. *See* 11 U.S.C. § 523(a)(2), (4), (11). *See also id.* § 523(a)(6) (exempting from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity").

Like their English forebears, bankruptcy laws in the American colonies were concerned exclusively with actions against debtors, though the statutes varied in their approach to discharge and the form of petitions. *See* BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 186 (2002); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974); F. REGIS NOEL, HISTORY OF THE BANKRUPTCY LAW 33-66

(1919). Some colonies also had laws modeled on the English insolvency acts, which temporarily allowed imprisoned debtors to petition for release in exchange for liquidation and *pro rata* sale of their assets. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1111 (1851); *see also* Thomas Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 513-17 (1996). Nevertheless, as the Court later concluded, insolvency laws fit the traditional definition of a bankruptcy because the laws conditioned release on the disposition of the debtor's debt. *See, e.g., Moyses*, 186 U.S. at 186; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

The central constitutional concern leading to the Bankruptcy Clause was the inability to coordinate bankruptcy discharges among the states. Charles Pinckney first proposed the Bankruptcy Clause during a debate at the Convention in Philadelphia, which he proposed be included as part of the Full Faith and Credit Clause. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 546–47 (Ohio Univ. Press 1966).

Importantly, the Convention understood that empowering Congress to enact national bankruptcy laws would ensure the uniform disposition of the debtor's estate and uniform treatment of the debtor necessary to give debtors a fresh start. The tie to the concern over full faith and credit is confirmed by Madison, who wrote in *Federalist No. 42* that "establishing uniform laws of bankruptcy...will prevent so many frauds where the parties or their property may lie or be removed into different states." THE FEDERALIST, NO. 42, at 241 (James Madison) (John C. Hamilton ed., 1869). Indeed, given that the Framers were

familiar with cases where debtors discharged in one state were imprisoned in another, *see Katz*, 546 U.S. at 366-67 (citing *James v. Allen*, 1 Dall. 188, (C.P. Phila. Cty. 1786)), "the Framers, in enacting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders." *Katz*, 546 U.S. at 377.

Congress has exercised its bankruptcy power consistent with this purpose and with the original understanding that "the subject of Bankruptcies" only includes laws governing the debtor-creditor relationship. Congress left bankruptcy law to the states until 1800, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803), when it enacted legislation substantially similar to existing English law, 5 Geo. 2, ch. 30 (1732) (Eng.). As expressed by James A. Bayard of Delaware, a leading proponent of the Bankruptcy Act of 1800, the object of bankruptcy was to create a uniform system of "law regulating the relation of debtor and creditor...." 5th Cong., 3d sess. (Jan. 15, 1799), 9 ANNALS OF CONGRESS 2664 (quoted in Br. of Historian Bruce H. Mann, Amicus Curiae in Support of Resp't, *Cent. Va. Cmty. Coll v. Katz*, 546 U.S. 356 (2006) (No. 04-885), at 25). Consistent with this traditional understanding of bankruptcy law, the Act restricted bankruptcy to actions by creditors against merchant debtors upon proof of the debtor's commission of an act of bankruptcy. Ch. 19, § 1, 2 Stat. 19. The Act also conditioned discharge on the consent of two-thirds of creditors and certification by the bankruptcy commissioner to the district court that the debtor had cooperated. *Id.* § 36, 2 Stat. 31. Consistent with the Framers' intent to ensure that States respected each others' discharge orders, the 1800 Act also granted federal courts the power to

issue writs of habeas corpus to release discharged debtors from state prisons. *See id.* § 38, 2 Stat. 32. Though such actions would not involve the *res* of the estate, they quite literally affected the "debtor's rights, liabilities, options, or freedom of action." *Pacor*, 743 F.2d at 994.

While Congress passed several bankruptcy acts in the 19th century, the statutes differed only in the category of persons eligible for bankruptcy protection, not the fundamental role of bankruptcy as governing debtor-creditor relations. Justice Story noted that though the English bankrupt acts only applied to traders, extending them to other types of debtors "is a mere matter of policy, and by no means enters into the nature of such laws." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1113 (quoted in *Moyses*, 186 U.S. at 184-85). As a result, the "'subject of Bankruptcies' has remained stable, even as the means of addressing the subject of bankruptcies have changed." Plank, *supra*, at 500.

The Bankruptcy Act of 1898 was the first national bankruptcy law to have any permanence. Ch. 541, 30 Stat. 544 (repealed 1978). The 1898 Act abolished many of the prior restrictions on debtor discharge, including creditor consent, Ch. 541, 30 Stat. at 550, and allowed even solvent debtors, but not corporations, to petition for discharge. Ch. 541, 30 Stat. at 544 (1898); *see also* Tabb, *supra*, at 24-26. Even so, the purpose of the 1898 Act was to allocate the bankrupt estate—the *res*—amongst the various claimants. *See generally* 1 COLLIER ON BANKRUPTCY § 1.01[1][a] (15th ed. rev. 2006). Though these provisions initiated a more debtor-friendly attitude toward disposing of the debtor-creditor relationship,

like all preceding bankruptcy laws, they were concerned only with resolving that relationship.

B. THE COURT CONSISTENTLY HAS UNDERSTOOD THE "SUBJECT OF BANKRUPTCIES" TO BE LIMITED TO DEBTOR-CREDITOR DISPUTES.

Expanding bankruptcy jurisdiction beyond the debtor-creditor relationship would stretch the definition of bankruptcy beyond what was understood either by the delegates to the Convention or by Congress subsequently. It would also require a fundamental recasting of the power of Congress to enact a jurisdictional statute that defines bankruptcy more broadly than the Court has defined "the subject of Bankruptcies." Indeed, such a definition would expand bankruptcy jurisdiction beyond the limits of the Constitution.

Historically, the Court has defined the "subject of Bankruptcies" as "nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.'" *United States v. Bekins*, 304 U.S. 27, 47 (1938) (quoting *In re Reiman*, 20 F. Cas. 490 (S.D.N.Y. 1874) (No. 11, 673), *aff'd*, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11, 675)). *See also Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14 (1938); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 588 n. 18 (1935) (using the same formulation); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry., Co.*, 294 U.S. 648, 672-73 (1935); *Hanvover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (citing this definition).

This definition is nearly identical both to the language of the *Pacor* test, cited with approval in

Celotex, and to a definition formulated by Justice Story in 1833. Story rejected defining "the subject of bankruptcies" by reference to the kinds of procedures used to dispose of disputes between insolvent debtors and their creditors. Rather, Story defined "the subject of bankruptcies" by reference to that relationship itself: "Perhaps as satisfactory a description of a bankrupt law, as can be framed, is that it is a law for the benefit and relief of *creditors and their debtors*, in cases in which the latter are unable, or unwilling, to pay their debts." *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1111, 1113 (1851) (emphasis added).

In the following decades, Justices Catron and Blatchford, serving outside the Court, followed Story in formulating the definitions later cited with approval by the Court. Justice Catron, sitting on circuit in *In re Klein*, never considered that the bankruptcy power extended to third parties outside the creditor-debtor relationship. *See In re Klein*, 14 F. Cas. 716 (C.D.D. Mo. 1843) (No. 7865). Rather, he wrote that the bankruptcy power extended "to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts." 14 F. Cas. at 718, *cited with approval* at *Radford*, 295 U.S. at 588 n. 18; *Moyses*, 186 U.S. at 186.

Following Story and Catron, then-Judge Blatchford agreed that the "subject of bankruptcies" was "not, properly, anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." *In re Reiman*, 20 F. Cas. 490

(S.D.N.Y. 1874) (No. 11, 673), *aff'd*, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11, 675).

The Court later adopted this definition as its own in *Moyses*, 186 U.S. at 187,[8] and reaffirmed the debtor-creditor limitation to the federal bankruptcy power in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., Co.*, 294 U.S. 648, 671 (1935). In that case, the Court affirmed an interlocutory decree enjoining the sale of bonds held by petitioners—banks and a finance corporation—as security for collateral notes of the debtor railway company. The Court nevertheless quoted the opinion of Judge Cowen that "the subject of bankruptcies" was "any person's general inability to pay his debts." 294 U.S. at 670 (quoting *Kunzler v. Kohaus*, 5 Hill 317, 321 (N.Y. 1843) (cited with approval at *Moyses*, 186 U.S. at 187)). In addition, the Court again cited *In re Reiman* to the effect that

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[8] Though Travelers selectively cites *Moyses* for the proposition that "the Constitution...did not limit "[the subject of Bankruptcies"] to the language used," Br. at 23 (quoting *Moyses*, 186 U.S. at 187), that statement stands only for the proposition that "the subject of Bankruptcies" is broad enough to include both bankruptcy and insolvency laws. Indeed, the Court had held as much since the opinion of Chief Justice Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). Importantly, however, the reason the Court has not found any constitutional distinction between bankruptcy and insolvency laws is because those laws, whatever the differences between their technical mechanisms, both provide final resolution of the debtor-creditor relationship and therefore implicate the defining feature of bankruptcy law. Indeed, the Court has noted that "while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations." *Continental Ill.*, 294 U.S. at 679.

"the 'subject of bankruptcies' was nothing less than 'the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.'" 294 U.S. at 672-73.

That definition has never been as broad as the test for res judicata that is triggered by a "common nucleus of operative fact" and which the Second Circuit properly rejected. App. 32a. Bankruptcy has never been understood to guarantee resolution of all transactions at all connected with a debtor. Indeed, the injunctive relief sought by Travelers discharging all claims transactionally related to its provision of insurance to Manville is far broader than would historically have been available to a debtor in bankruptcy.

For example, the Court has confirmed that bankruptcy discharge does not extend to actions for fraud, even by the debtor himself. *See Wilmot v. Mudge*, 103 U.S. 217 (1880). In *Mudge*, corporate creditors sued a debtor for fraud in a Massachusetts court. *See* 103 U.S. at 217. The debtor defended on the ground that a composition agreement with his creditors had discharged all his liabilities. *See id.* To the contrary, the Court held that "[t]he provision that no debt created by a fraud shall be discharged by any proceedings in bankruptcy is a very positive and clear statement of a principle applicable as well to such proceedings authorized after as before [the 1874 composition agreement amendment] was enacted." 103 U.S. at 220. *See also Forsyth v. Vehmeyer*, 177 U.S. 177 (1900) (holding defendant could not use discharge as defense to judgment that rested on fraud); *McIntyre v. Kavanaugh*, 242 U.S. 138, 141 (1916) (denying discharge for brokerage that sold

client stocks without permission on the basis of a "willful and malicious injuries" exception). Current bankruptcy law has codified this principle by excepting actions for fraud from discharge for individual debtors. *See* 11 U.S.C. § 523(a). While corporations are allowed broader discharges through bankruptcy, even that is limited. Under 11 U.S.C. § 1141(d)(6), tax fraud and fraud debt due to either government actors or *qui tam* relators remain non-dischargeable, even for a company in bankruptcy.

Accordingly, to extend "related to" jurisdiction beyond the broad parameters of the test articulated in *Pacor* and adopted by the Court in *Celotex* would allow Congress to define jurisdiction over federal bankruptcies more expansively than the Court has ever construed Congress' power to establish "uniform Laws on the subject of Bankruptcies." As the Court has recognized, for over four centuries bankruptcy law in England and the United States has governed only the disposition of the relationship between a debtor and his or her creditors. While bankruptcy law has developed a variety of novel mechanisms to take account of new needs and policy preferences, the law has always done so within the parameters of the debtor-creditor relationship. The attempt to extend the bankruptcy power to provide plenary indulgences for nondebtors has no mooring in either the Constitution or any of the bankruptcy statutes.

III. THE BANKRUPTCY COURT PURPORTED TO ALLOW TRAVELERS TO EXPUNGE ITS OWN INDEPENDENT LIABILITIES WITHOUT REGARD TO ITS STATUS AS A NONDEBTOR.

In enjoining Respondents on the basis of language in the 1986 Confirmation Order, as the Second

Circuit recognized, the bankruptcy court "erred by subsequently interpreting those terms without reference to the court's jurisdictional limits." App. 31a. Instead of recognizing the constraints of subject-matter jurisdiction, the bankruptcy court engaged in a factual inquiry to determine the nature of the plaintiffs' claims, citing Second Circuit cases referring to tests for *res judicata*. App. 183a. Hence instead of asking whether Respondents' actions were "related to" the debtor's estate to allow it to exercise subject-matter jurisdiction under § 1334(b), the bankruptcy court asked whether those claims were "related to" Travelers' Manville insurance policies in a factual sense, as if that resolved the jurisdictional issue. *See* App. 169a et seq. ("[T]he direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer.").

Travelers makes much of this misdirected factual inquiry by terming it "unrebutted," Br. at 17, "fundamental," *id.* at 18, and "affirmed by the district court *and* the court of appeals." *Id.* at 19. However, relying on the accuracy of this factual inquiry puts the factual cart before the jurisdictional horse, for this assumes that the bankruptcy court had subject-matter jurisdiction to conduct an inquiry into independent claims against Travelers in the first place. The existence of subject-matter jurisdiction and not transactional similarity is the fundamental question. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002).

Nor can the lack of subject-matter jurisdiction be salvaged by claiming that the settlement of new state law claims against Travelers was part of the final workout of the Manville bankruptcy. For starters,

directly contrary to the structure of § 524(g), the over $400 million which Travelers agreed to pay pursuant to agreements concluded in 2004 was never to become part of the Manville Trust. App. 150a-152a. That money was directed to private purveyors of injunctive relief, not to the broad class of Manville claimants.

Further, the structure of the original settlement makes clear that Travelers was settling only its insurance liability in 1986. All parties to the original settlement agreement recognized that the channeling injunction was designed only to limit claims made against the policies and did not anticipate any release in bankruptcy of independent claims against Travelers—as confirmed by Travelers' counsel at the time. *See* Resp. J.A. 13a ("The channeling order is intended only to channel claims against the *res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (i.e., the Policies)...."). The bankruptcy court's own orders at the time further distinguished the settled claims in the bankruptcy estate from "bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims." App. 446a. By contrast, the bankruptcy court's present injunction is of such sweep that if a Travelers representative assaulted a plaintiff at a negotiating session, any state law assault suit would be enjoined since such claims "directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos." App. 95a.

There is an unseemly quality to the arguments put forward by Petitioner Common Law Settlement Counsel and amici Future Claimants Representa-

tives. At bottom, each argues that the returns to its constituents can be enhanced if the bankruptcy courts are able to trade off injunctive relief against unrepresented claimants for payments to those already at the table. Neither seems troubled by the fact that Travelers is seeking to close out its liabilities by paying off a subset of current asbestos tort claimants at the expense of other claimants, most notably the future claimants who have not yet filed suit.

It is doubtless true that being able to auction off the rights of unrepresented parties does make settlement easier. The risk of trading off the rights of the unrepresented has led the Court to strike down any preclusive effect on third parties who do not consent to a settlement. *See Martin v. Wilks*, 490 U.S. 755 (1989). The risks associated with preclusion against unrepresented parties are magnified when the rights at stake are those of future claimants whose interests may not yet be manifest. That inter-temporal trade-off is precisely what the Court struck down in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing certification of future asbestos claimants in Rule 23(b)(1) settlement class), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (same under Rule 23(b)(3)). It is no more acceptable to sell off the interests of the unrepresented just because a settlement is channeled through a bankruptcy court. *Cf. Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

As with the sweeping asbestos class action settlements of last decade, there is a grave risk of abuse if the bankruptcy power is allowed to be auctioned off

because of its injunctive reach. As now-Chief Judge Jacobs of the Second Circuit noted in a different case:

> [A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.

In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005).

IV. THE REMAND BELOW WAS PROPER.

The bankruptcy court did not examine the various potential state law claims against Travelers to determine which were premised on derivative liability from Manville. Rather, the only question asked by both the bankruptcy and district courts concerned whether the state-law claims related to the Manville insurance policies with Travelers in terms of the claims' factual overlap with exposure to Manville asbestos. Accordingly, the Bankruptcy Court did not distinguish between claims implicating the debtor's estate and the debtor-creditor relationship—over which it had subject-matter jurisdiction—and claims unrelated to the estate or the debtor-creditor relationship—over which it lacked subject-matter jurisdiction.

As the Second Circuit recognized—and as Travelers studiously ignores in its brief—the bankruptcy and district courts never properly established a source for their subject-matter jurisdiction. App. 35a-36a ("[T]he district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to

Manville's insurance policy proceeds and the *res* of the Manville estate."); *see also* App. 32a (noting that fact that claims may arise "from a common nucleus of operative facts involving Travelers and Manville (*e.g.*, the Manville / Travelers insurance relationship) is of little significance from a jurisdictional standpoint").

The Second Circuit accordingly remanded this case for the bankruptcy court to measure the state-law claims against the jurisdictional line which Congress, the Court, and the centuries-old history of bankruptcy law have always drawn. Because the judgment of the Second Circuit rightly insisted on the traditional limits on bankruptcy jurisdiction and instructed the bankruptcy court to do the same on remand, that judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Supreme Court Bankruptcy Cases Since 1984

Since Congress passed the 1984 Act, every bankruptcy-related case that the Court has decided involved administration of the debtor's estate. Unless otherwise stated, all statutory references are to the Bankruptcy Code (11 U.S.C. et. seq.).

Jurisdiction over Proceedings Involving the Debtor's Estate: *Marshall v. Marshall*, 547 U.S. 293 (2006) (holding that probate exception does not prevent federal court from hearing interference tort claim brought by debtor); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (refusing to extend sovereign immunity to bar proceeding brought by bankruptcy trustee against state agencies to recover alleged preferential transfers); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (holding that proceeding brought by debtor to discharge student loan debt does not implicate Eleventh Amendment immunity); *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) (holding that "related to" jurisdiction encompasses proceeding brought by third-party against surety on supersedeas bond, when bond stayed execution of judgment against debtor); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (holding that § 106(c) does not waive United States' sovereign immunity from action by bankruptcy trustee seeking monetary recovery); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (holding that suit brought by bankruptcy trustee does not override right to jury trial); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96 (1989) (plurality opinion) (holding that Congress did not abrogate Eleventh Amendment immunity of states with

§ 106(c) in adversarial proceeding brought by bankruptcy trustee).

Nondischargeability of Claims Against Debtor: *Archer v. Warner*, 538 U.S. 314 (2003) (holding that tort obligations for fraud may fall within nondischargeability rule of § 523(a)(2)(A)); *Young v. United States*, 535 U.S. 43 (2002) (holding that "lookback period" for tax obligations is tolled during pendency of prior bankruptcy petition); *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (holding that treble damages awarded on account of debtor's fraud are nondischargeable under § 523(a)(2)(A)); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (finding debt arising from medical malpractice judgment attributable to negligent or reckless conduct is dischargeable); *Field v. Mans*, 516 U.S. 59 (1995) (holding that creditor must justifiably rely on debtor's fraudulent misrepresentation for debt to be nondischargeable); *Grogan v. Garner*, 498 U.S. 279 (1991) (holding that creditor must demonstrate that discharge exception applies by preponderance of evidence); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (holding that restitution obligations of debtor are dischargeable under Chapter 13); *Kelly v. Robinson*, 479 U.S. 36 (1986) (exempting restitution obligations set by state criminal court from discharge in Chapter 7); *Ohio v. Kovacs*, 469 U.S. 274 (1985) (determining that debtor's environmental obligation is dischargeable debt).

Exemptions from Inclusion in Debtor's Estate: *Rousey v. Jacoway*, 544 U.S. 320 (2005) (allowing debtor to exempt assets in IRA from bankruptcy estate); *Patterson v. Shumate*, 504 U.S. 753 (1992) (holding that debtor's interest in pension plan can be excluded from bankruptcy estate); *Owen v. Owen*, 500 U.S. 305 (1991) (determining that judicial liens can be exempt from bankruptcy estate).

Priority of Claims Against Debtor's Estate: *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006) (holding insurer's claims for unpaid workers' compensation premiums outside statutory priority); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) (determining IRS payments not to be categorically subordinated to other unsecured creditors' claims); *United States v. Noland*, 517 U.S. 535 (1996) (addressing claim subordination under Code); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993) (holding that Chapter 13 debtor cannot reduce valuation of undersecured homestead mortgage); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (applying "absolute priority rule" to debtor's promise of future labor to reorganized enterprise).

Taxation of Debtor or Debtor's Estate: *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008) (holding tax exemption for debtor inapplicable to pre-confirmation transfers); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000) (holding that if substantive law places burden of proof on taxpayer, taxpayer also has burden of proof in bankruptcy court); *Begier v. IRS*, 496 U.S. 53 (1990) (holding that debtor's trust fund tax payments to IRS cannot be avoided as preferences); *United States v. Energy Res. Co.*, 495 U.S. 545 (1990) (holding that bankruptcy court has authority to treat tax payments made by Chapter 11 debtor as trust fund payments); *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989) (holding no prohibition on state taxing bankruptcy liquidation sale).

Obligations of Trustee to Debtor's Estate: *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (prohibiting debtors' attorneys from receiving estate funds

unless attorneys are employed by trustee and approved by court); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (holding bankruptcy trustee's contest of property exemption time barred); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992) (requiring bankruptcy trustee to pay income tax attributable to corporate debtors' property); *Union Bank v. Wolas*, 502 U.S. 151 (1991) (holding that payments on long-term debt can qualify for "ordinary course of business" exception to trustee's power to avoid preferential transfers); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (1986) (forbidding trustee abandonment of property in contravention of state health or safety laws); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (holding that bankruptcy trustee of corporation can waive corporation's attorney-client privilege with respect to pre-bankruptcy communications).

Miscellaneous Issues Involving Debtor or Claims Against Debtor's Estate: *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) (permitting contract-based claim against debtor for attorney's fees); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (holding that debtor's fraudulent conduct can forfeit right to proceed under Chapter 13); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (holding "time bar" defense waived if not raised by debtor); *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293 (2003) (forbidding FCC from revoking debtor's spectrum license); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) (preventing administrative claimant from seeking payment of claim from property encumbered by secured creditor's lien); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (barring debtor's pre-bankruptcy equity holders from

receiving ownership interests in reorganized entity); *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998) (requiring creditor to satisfy state and federal perfection requirements); *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (assessing value of creditor's security interest where debtor exercised "cram down" option under Chapter 13); *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16 (1995) (determining that creditor bank's "administrative hold" on debtor's account was not "setoff"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (determining if fraudulent transfer occurred based on "reasonably equivalent value" of property); *Rake v. Wade*, 508 U.S. 464 (1993) (holding creditor entitled to interest on mortgage instruments); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) (holding failure to file timely proof of claim can constitute "excusable neglect"); *Barnhill v. Johnson*, 503 U.S. 393 (1992) (holding debtor transfer deemed to occur when check honored); *Dewsnup v. Timm*, 502 U.S. 410 (1992) (determining "strip down" value of creditor's lien); *Toibb v. Radloff*, 501 U.S. 157 (1991) (holding individual debtors eligible for Chapter 11); *Johnson v. Home State Bank*, 501 U.S. 78 (1991) (holding mortgage lien subject to inclusion in Chapter 13 reorganization plan); *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (holding that debtor cannot avoid fixing of ex-spouse's lien on divorce decree award); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (holding creditor entitled to post-petition interest on nonconsensual oversecured claim); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) (holding creditors not entitled to compensation for delay caused by automatic stay).

REPLY BRIEF

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(15)

No. 08-295

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

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In The Supreme Court of the United States

THE TRAVELERS INDEMNITY CO., ET AL., PETITIONERS

v.

PEARLIE BAILEY, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have briefed a different case than the one before this Court. They claim that the original 1986 Manville confirmation order "is not at issue" here (Bailey Br. at 8; Chubb Br. at 23); that Judge Lifland "expanded" the confirmation order when he enforced it in 2004 (Chubb Br. at 53; Bailey Br. at 12); that the direct actions enjoined by the bankruptcy court seek to hold Travelers liable "for its own conduct independent of its insurance policies to Manville" (Bailey Br. at 10; Chubb Br. at 14); and that the bankruptcy court relied on the "related to" jurisdictional prong of Section 1334(b) of the Judicial Code to bar the direct action suits.

All of these assertions are untrue. The record before this Court establishes:

- The 1986 confirmation order bars "any Person" from filing "any and all claims" "based upon, arising out of or relating to" the Travelers insurance policies. (App. 274a–275a, 439a).
- On direct appeal in 1988, the U.S. Court of Appeals for the Second Circuit rejected the same arguments advanced here—that the bankruptcy court exceeded its subject matter jurisdiction or granted Travelers a "*de facto* discharge." (App. 194a).
- Years later, asbestos claimants sued Travelers for actions taken in its capacity as Manville's insurer, including its "underwriting of the Manville policies, inspection of Manville plants, investigations of asbestos-related claims against Manville, defense of lawsuits against Manville, and negotiations of settlements of asbestos-related lawsuits against Manville." (App. 129a–130a).
- The bankruptcy court enjoined the direct actions, ruling that they are—and always have been—barred by the 1986 confirmation order. The court neither invoked "related to" jurisdiction nor "expanded" the 1986 confirmation order.
- While the bankruptcy court order was approved by both appellate courts, the Second Circuit nonetheless held that the bankruptcy court was without jurisdiction in 1986 to bar the claims in question.

The case now comes before this Court on a pure question of law: Whether bankruptcy courts have subject matter jurisdiction to confirm reorganization plans that channel, release and enjoin claims against non-debtors "based upon, arising out of or relating to" insurance policies that constitute property of the estate. As set out in Travelers' opening brief, bankruptcy courts have always had this power. Congress confirmed this power in 1994 by codifying the Manville confirmation order and making it a model for scores of other asbestos-related reorganizations.

Respondents have abandoned the Second Circuit's manifestly incorrect conclusion that bankruptcy jurisdiction is limited to the *res* of a debtor's estate. Bailey Br. at 40–41; Chubb Br. at 40. And Respondents agree that bankruptcy courts may, in appropriate circumstances, enjoin claims against non-debtors. Bailey Br. at 30; Chubb Br. at 22. To defend the result below, Respondents have briefed the facts of a case other than the case before this Court.

A. Respondents Ignore the Bankruptcy Court's Comprehensive Findings of Fact

Factual findings made by a trial court are binding and conclusive unless timely challenged and found by a reviewing court to be clearly erroneous. Fed. R. Bankr. P. 8013; *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). *See also Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (discussing the "two court rule," under which this Court sits as a "court of law . . . rather than a court for correction of errors in fact

finding"); *Exxon Co.* v. *Sofec, Inc.*, 517 U.S. 830, 840–41 (1996) (applying same).

The facts of this case are carefully set out in sixty pages of detailed findings (App. 101a–159a) the bankruptcy court made after a multi-day hearing at which witnesses were examined and cross-examined, documentary evidence was offered and received and every Respondent in this case appeared and participated. Respondents simply ignore these factual findings.

As the bankruptcy court noted, prior to entry of the Manville confirmation order, Travelers and Manville had an extensive insurance relationship spanning three decades and involving more than 425 policies. (App. 111a–112a, 274a–275a, 439a). As Judge Lifland found, pursuant to that relationship, Travelers:

- "paid millions of dollars in counsel fees incurred in answering interrogatories and responding to document requests served on Manville, defending Manville witnesses at deposition[s], drafting legal memoranda, negotiating settlements on Manville's behalf and defending Manville at trial and on appeal in asbestos-related suits";
- "funded Manville's defense efforts virtually *in toto*, including Manville's defense of *Borel*, *Templait* and *Karjala*, three of the first third-party asbestos lawsuits filed in the United States";
- hired numerous claims handlers and other employees "dedicated to the Manville account"; and

- "organized . . . seminars at which Manville and its national coordinating counsel educated Travelers and local defense counsel as to Manville's history and its experience with asbestos." (App. 120a–127a).

Judge Lifland next examined the allegations made in the direct action lawsuits to determine whether these new suits were "based upon, arising out of, or related to any or all of the Policies" that Travelers sold to Manville. Judge Lifland found that the suits:

- "place Manville at the center of the development of [the 'no duty to warn'] defense and the education of Travelers about the defense theory, and suggest that this happened in the course of Travelers' fulfillment of its duty to defend Manville under the Policies";
- "rely upon acts or statements by Manville or its counsel in connection with defense of the underlying lawsuits to demonstrate the purported misconduct of Travelers";
- "constitute one concerted front in a larger campaign by the asbestos plaintiffs' bar to 'drag in more defendants'" and to hold them liable for the "sins of Manville";
- were filed by plaintiffs who "are dissatisfied with their inability to collect directly from Manville, and thus attempt to collect Manville's debts by '[p]utting [n]ew [d]efendants [i]n Manville's [c]hair'";

- "center[] on Travelers' defense of Manville in asbestos-related claims, particularly during the period from the decision in the *Borel* case in 1973 and the filing of the Manville bankruptcy petition in 1982"; and
- allege that "Travelers negligently performed inspections" at Manville plants and "conspired to deprive plaintiffs of information regarding the risks of asbestos exposure . . . because it did not share its Manville-gained asbestos knowledge." (App. 127a, 139a–144a).

On these facts, there can be no dispute that the direct action suits violate the plain terms of the 1986 Manville confirmation order. The bankruptcy court reached that conclusion,[1] the district court agreed

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[1] In a misguided effort to question Judge Lifland's interpretation of the meaning and scope of the order he himself issued, Chubb cites correspondence exchanged during early negotiations of the Manville plan. The final confirmation order was entered following eighteen additional months of negotiations. Judge Lifland dismissed this correspondence as irrelevant: "Any purported arguments based on statements of the parties during the settlement drafting process or otherwise are . . . completely beside the point." (App. 169a–170a) (citing *Matter of Memorial Hospital*, 862 F.2d 1299, 1300 (7th Cir. 1988) (court rulings are "public act[s] of the government"—not "private agreement[s]" among parties)). A bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference. *See, e.g., In re Airadigm Communications, Inc.*, 547 F.3d 763, 768 (7th Cir. 2008) ("A bankruptcy court's interpretation of a plan it confirmed is subject to full deference as an interpretation of its own order and may be overturned only if the record shows an abuse of discretion in the interpretation."); *JCB, Inc.* v. *Union Planters Bank*, 539 F.3d 862, 869 (8th Cir. 2008) (same). No court on direct review and no court below relied on the irrelevant materials Chubb cites. *Cf. Graver Tank*, 336 U.S. at 275.

and affirmed and the Second Circuit likewise upheld the core factual findings that "the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville." (App. 33a).

The Second Circuit reversed on a purely legal issue, brushing aside Judge Lifland's factual findings as being (in the Second Circuit's view) "of little significance from a jurisdictional standpoint." (App. 32a). Respondents cannot now defend the ruling below by "spinning" the evidentiary record into something more to their liking by, for example, saying that the direct actions either "have nothing to do with 'the conduct of, claims against, or demands on' . . . Manville" (Bailey Br. at 31–32) or "seek to recover from [Travelers] without regard to the terms or limits of any insurance policies" sold to Manville (Chubb Br. at 12). Such characterizations are rebutted by the record and should be rejected.

B. Congress Lawfully Conferred Subject Matter Jurisdiction on the Bankruptcy Court to Enter and Enforce the Manville Confirmation Order

The Constitution vests Congress with plenary power to make "uniform Laws on the subject of Bankruptcies," art. I, § 8, cl. 4, that apply notwithstanding "any Thing in the Constitution or Laws of any State to the Contrary," art. VI, cl. 2. Congress, in turn, entrusted the Judiciary with federal jurisdiction over "all cases under title 11," "all civil proceedings arising under title 11, or arising in or related to cases under title 11" and "all the property, wherever located, of the debtor as of the

commencement of such case, and of property of the estate." 28 U.S.C. §§ 1334(a), (b), (e)(1).[2]

1. "Arising Under" and "Arising In"

Judge Lifland exercised "arising under" and "arising in" jurisdiction when he confirmed the Manville plan of reorganization in 1986. 28 U.S.C. § 1334(b); *id.* §§ 157(b)(1), (b)(2)(L); *see Stoll* v. *Gottlieb*, 305 U.S. 165, 171 (1938) (construction and application of bankruptcy statute "enacted pursuant to constitutional grants of power" constitutes "federal question"). The confirmation of the Manville plan was a "civil proceeding" arising under and arising in title 11. The bankruptcy court's power to enter particular components of the Manville confirmation

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[2] "'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings.'" *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998)). With respect to bankruptcy matters, the term is used three ways. *First*, there is "true" subject-matter jurisdiction, which is vested in the Judiciary by Section 1334 of the Judicial Code. *Kontrick*, 540 U.S. at 452–53. There is no true jurisdictional question in this case, which falls squarely within the terms of Section 1334. *Second*, there is the separate question of whether judicial officers without Article III status may exercise "[t]he judicial Power of the United States," U.S. Const. art. III, § 1. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). That is not at issue here. 28 U.S.C. § 157(b)(2)(L) (confirmation orders are core). *Finally*, there is the colloquial use of the term to describe a court's proper exercise of the power conferred by Congress under the Bankruptcy Clause. Respondents invoke "jurisdiction" only in this third sense. But the substantive merits of Judge Lifland's 1986 confirmation order and 2004 enforcement of that order do not implicate the bankruptcy court's adjudicatory power.

order is a substantive question of whether the proposed plan "complies with the applicable provisions of this title," 11 U.S.C. § 1129(a)(1) (prerequisite to confirmation), and not, as the Second Circuit concluded, a question of "subject matter jurisdiction."

The Second Circuit affirmed Judge Lifland's jurisdiction to enter the confirmation order on direct appeal in *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) (App. 188a–203a), and *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). In particular, the Second Circuit ruled that the insurance injunction component of the confirmation order—which it described as "enjoin[ing] all future suits against the insurers related to settled policies"—is the "cornerstone" of the plan and "a critical part of the entire reorganization." (App. 189a, 192a). As such, the entire confirmation order—including the injunction protecting Travelers—was ruled to be within the subject matter jurisdiction of the bankruptcy court. Critically, *Respondents do not contend otherwise.*[3]

Moreover, Respondents' effort to impugn the jurisdictional basis of the 1986 confirmation order is foreclosed by Congress's specific codification of the Manville confirmation order in Section 111 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994), *codified at* 11 U.S.C. §§ 524(g) & (h). Congress modeled that law on the

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[3] Chubb Br. at 23 ("respondents do not challenge [the] 1986 order"); *id.* at 55 (respondents make "no attack on the confirmation order"); Bailey Br. at 8 ("confirmation of the Manville plan . . . is not at issue in this case").

Manville bankruptcy, and expressly "grandfathered" the Manville confirmation order into Section 524(g) via Section 524(h). While neither Section 105 nor Section 524 confers jurisdiction, it would be nonsensical to presume that Congress codified the substance of a result that exceeds the jurisdiction Congress itself provided over "all civil proceedings arising under title 11." 28 U.S.C. § 1334(b); *see also* S. REP. NO. 102–279, at 5 (1992).

Chubb recasts Sections 524(g) and (h) as too narrow to bar the direct action claims against Travelers, arguing that courts may "bar claims against non-debtor insurers only to the extent such claims seek to recover on account of the *debtor's* conduct and would thus risk reducing the *debtor's* insurance and depleting the estate." Chubb Br. at 11–12 (emphasis added). Thus, under Chubb's position here, Section 524(g) has no applicability to "third parties facing claims arising out of their own allegedly tortious conduct," including any claims of bad-faith claim handling or other allegations of extracontractual liability. *Id.* at 34–35.

In addition to its utter lack of support in the actual words of the statute, Chubb's position in this Court is wholly inconsistent with Chubb's own sponsorship of numerous 524(g) injunctions substantively identical to the Manville injunction. Chubb has contributed hundreds of millions of dollars to asbestos bankruptcy trusts in support of injunctions that Chubb now tells this Court are impermissible. In the recent *J.T. Thorpe* asbestos bankruptcy, for example, in which Chubb contributed $45 million to a bankruptcy trust, Chubb sought and obtained protection from any claim arising from

Chubb's "insuring relationship with any of the Debtors, including any claim for 'bad faith' or extra-contractual liability." *In re J.T. Thorpe, Inc.*, No. 02–14216 (Bankr. C.D. Cal. July 14, 2005). Similarly, in the *Swan* asbestos bankruptcy, claimants are enjoined from suing Chubb for any claim "based upon, relating to, arising out of, or in any way connected with [the debtor] or . . . any insurance coverage that may apply to [the debtor]." *In re Swan Transportation Co.*, No. 01–11690 (Bankr. D. Del. Sept. 1, 2005).

There are dozens of other confirmation orders in asbestos-related bankruptcy proceedings containing language similar or identical to the orders entered by Judge Lifland in the Manville bankruptcy. The judges that entered these orders, the appellate courts that affirmed them, and the numerous debtors, insurers and claimants who have long relied on them have properly looked to the Manville confirmation order as precedent, as did Congress when it enacted the Bankruptcy Reform Act of 1994. *See* H.R. REP. NO. 103–835, at 40 (1994). Chubb's claim that the Manville confirmation order sweeps too broadly is an abrupt and inconsistent about-face and should be weighted accordingly. *Cf. McCoy* v. *Wisconsin Court of Appeals*, 486 U.S. 429, 440–41 & n.14 (1988) (litigants must "act with candor in presenting claims for judicial resolution," which necessarily requires "disclos[ure of] facts and law contrary" to their interests) (citing ABA Model Rules of Professional Conduct Rule 3.3(a) (1984 ed.)).

2. "Related To"

Respondents miss the mark because they ignore the "arising under" and "arising in" jurisdictional grants in Section 1334(b) and instead try to shoehorn Judge Lifland's 2004 enforcement of the confirmation order into the "related to" prong of Section 1334(b). Judge Lifland did not need to invoke "related to" jurisdiction. Rather, he affirmed the well-settled principle that a bankruptcy court's power to enter a confirmation order (which is derived from "arising under" and "arising in" jurisdiction) carries with it the power to enforce that order. *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) ("a federal court of equity has jurisdiction . . . to secure or preserve the fruits and advantages of a judgment or decree rendered therein") (citing *Root* v. *Woolworth*, 150 U.S. 401, 410–12 (1893)); *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112–14 (1904); *Riverdale Cotton Mills* v. *Alabama & Georgia Manufacturing Co.*, 198 U.S. 188, 194 (1905); *Freeman* v. *Howe*, 65 U.S. 450, 460 (1860)).[4]

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[4] The Court need not address Respondents' "related to" arguments, as any one of the three prongs of Section 1334(b) suffices to confer subject matter jurisdiction on the bankruptcy court. However, "related to" jurisdiction is in fact present here. The 1986 confirmation order proscribes suits "based upon, arising out of or relating to" the Travelers insurance policies (App. 274a–275a, 439a), and Judge Lifland's findings of fact demonstrate that suits stemming from Travelers' provision of insurance to Manville and its pervasive obligations thereunder for a period of three decades are sufficiently "related to" Manville and the Manville estate to fall within the final prong of Section 1334(b).

Aside from Respondents' "related to" argument, nothing remains of their position that subject matter jurisdiction is lacking. Respondents no longer dispute that bankruptcy jurisdiction extends beyond the *res* of a debtor's estate, or that it may be exercised to protect non-debtors in appropriate circumstances. Bailey Br. at 40–41; Chubb Br. at 40.[5] Respondents are not really complaining about subject matter jurisdiction at all—they are complaining about the substantive merits of the relief included in the confirmation order in 1986 and enforced in 2004. Chubb all but concedes this: "Petitioners' jurisdictional arguments—even if correct—thus provide no basis for reversing the Court of Appeals' judgment." Chubb Br. at 43.

Respondents' effort to convert the question of the proper exercise of bankruptcy court jurisdiction into one of subject matter jurisdiction is misguided. In *Continental Illinois National Bank & Trust* v. *Chicago, Rock Island & Pacific Railway*, 294 U.S. 648 (1935), for example, this Court rejected an assertion that a bankruptcy court exceeded its "jurisdiction" by enjoining claims when injunctions of the type at issue were "within the contemplation of [the Bankruptcy Act]." *Id.* at 677. The Court held that the challenge to the exercise of that injunctive power "presents a

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[5] It is notable that Respondent Bailey's appendix of Supreme Court decisions that supposedly do not involve non-debtors fails to account for the result in *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990), in which this Court affirmed a bankruptcy court's power to approve a reorganization plan mandating allocation of post-confirmation tax payments in a manner designed to relieve non-debtor officers of their personal liability for the payments in question.

question addressed not to the power of the court but to its discretion . . . ." *Id.*[6]

The Second Circuit erred in concluding that Judge Lifland had no "subject matter jurisdiction" to enforce the 1986 confirmation order. That error infected the entirety of the opinion below, and requires reversal.

C. Respondents Never Adequately Address the Two Other Infirmities in the Second Circuit's Ruling

In addition to the court of appeals' erroneous limitation of bankruptcy jurisdiction to the *res* of a debtor's estate (a limitation no Respondent defends), reversal of the ruling below is required for two additional, independent reasons: the Second Circuit erred in concluding that a federal bankruptcy confirmation order contained in a final judgment

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[6] The Bankruptcy Code gives federal courts (including appellate courts) a number of tools to address the propriety of any orders that are not authorized by the Bankruptcy Code and any alleged overreaching of a bankruptcy court's exercise of its jurisdiction. *See* Travelers' Opening Br. at 37 n.9. For example, before confirming a plan, a bankruptcy court must make a specific determination that the plan, *inter alia*, "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Section 524(g) also contains detailed additional requirements that must be satisfied prior to issuance of an asbestos-related channeling injunction. 11 U.S.C. § 524(g)(2)(B) (App. 472a–473a). In addition to being affirmed after full appellate review by the district court and the Second Circuit in 1988, the Manville plan was found by Congress to satisfy these strict requirements. 11 U.S.C. § 524(h); H.R. REP. NO. 103–835, at 40 (1994).

cannot enjoin the prosecution of state law claims, and the Second Circuit rewrote a 1986 final order on collateral review. Any one of the three errors in the ruling below is sufficient to reverse the Second Circuit's judgment, yet Respondents barely address the latter two.

1. Supremacy Clause

Neither opposition brief addresses the Second Circuit's unprecedented conclusion that, when alleged state law-created causes of action are channeled, enjoined and released in a *federal* confirmation order, *state* law determines whether they can be pursued post-confirmation. Respondent Bailey fails to cite (let alone discuss) the Supremacy Clause or this Court's ruling in *Perez* v. *Campbell*, 402 U.S. 637 (1971), and Chubb's tepid defense of the Second Circuit's ruling boils down to this: "State law came into play . . . only because the [direct actions] were *state-law* claims. Accordingly, . . . it was necessary to look to state law in order to determine the nature of those claims." Chubb Br. at 49.

But Chubb fails to explain *why* it is "necessary to look to state law" or to "determine the nature" of purported state-law claims. Most claims against bankrupt debtors are based on and "defined" by state law, *see id.* at 49–50 (citing *Butner* v. *United States*, 440 U.S. 48 (1979)), but the disposition of all claims—whether of federal or state origin—resolved in a federal bankruptcy court's final confirmation order are subject to the injunctive provisions of that order, subject to review on direct appeal. *Local Loan Co.*, 292 U.S. 234; *Hanover National Bank* v. *Moyses*, 186 U.S. 181 (1902). And that is the case regardless of

whether the bankruptcy court would have jurisdiction to adjudicate the barred claims in the first instance. *Local Loan Co.*, 292 U.S. at 239. *Cf. Matsushita Electric Industrial Co.* v. *Epstein*, 516 U.S. 367 (1996) (state court judgment approving a class action settlement validly resolved federal claims even though state court would not have had subject matter jurisdiction to adjudicate those claims).

2. Finality and Repose

Nor do the opposition briefs seriously address the Second Circuit's decision to rewrite on collateral review the same final confirmation order it had affirmed in full 20 years before. Unable to defend this highly irregular result, Respondents sidestep it by professing not to take issue with the 1986 confirmation order—only the bankruptcy court's 2004 enforcement of that order. This distinction is illusory.

It is the 1986 confirmation order that bars "any Person" from filing "any and all claims" "based upon, arising out of or relating to" Manville's insurance policies. (App. 274a–275a, 439a). It is the 1986 confirmation order that channels all such claims—whether sought to be asserted against Manville or Travelers—to the Manville trust. (App. 137a). And it is the 1986 confirmation order that requires every individual who submits a claim to the Manville trust to execute a full release of all claims that fall within the scope of the 1986 injunction—including claims against Travelers. (App. 138a–139a). These broad releases have been executed by over 660,000 asbestos

claimants (App. 139a), including virtually all of the Respondents in this case.[7]

Finally, the very objections raised by Respondents in this case to Judge Lifland's jurisdiction were raised and decided by the Second Circuit when it affirmed the confirmation order on direct appeal in the 1988 *MacArthur* decision, rejecting the assertion that "the Bankruptcy Court lacked jurisdiction and authority to enjoin suits against Manville's insurers." (App. 194a). Indeed, *certiorari* was sought to reverse the Second Circuit's decision on the following ground:

> The Bankruptcy Court Order Permanently Enjoining A Non-Debtor From Pursuing Its Independent Contractual Rights Against A Non-Debtor Exceeds The Jurisdiction Of [The Bankruptcy] Court .... [Petition for Writ of *Certiorari*, *MacArthur Co.* v. *Johns-Manville Corp.*, Case No. 87–2082 (filed June 20, 1988).]

This Court's denial of MacArthur's petition for *certiorari*, *see MacArthur Co.* v. *Johns-Manville Corp.*, 488 U.S. 868 (1988), made the 1986 confirmation order final. For the Second Circuit to

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[7] Of the 5,638 asbestos claimants who are purportedly parties to this appeal, all but two have received awards from the Manville trust and signed releases—and the other two "have claims against the Manville Trust that they have not yet submitted." Bailey Br. at 13. Clearly every Manville claimant who signed a release of claims "based upon, arising out of or relating to" the Travelers insurance policies in exchange for awards from the Manville trust cannot now complain that the bankruptcy court lacked power to enforce the terms of that release.

re-open the validity of the 1986 confirmation order now by sustaining a collateral attack on the same grounds as those rejected on direct review two decades before is untenable. The judicial system cannot function where issues clearly, directly and conclusively resolved on direct appeal can be "re-decided" 20 years later. *Cf. Celotex Corp.* v. *Edwards*, 514 U.S. 300, 312 (1995) (where jurisdiction exists over a proceeding in which an injunction was issued, courts should not address the merits of the injunction in a collateral proceeding).[8]

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[8] The Court need not and should not address the due process and other constitutional arguments raised by *amici* law professors Jagdeep S. Bhandari, *et al.* No party raises any such issues and none of the courts below passed upon these issues—and for good reason. Early in the reorganization process, "the Bankruptcy Court [appointed] a legal guardian for the future claimants," reasoning that future claimants were "entitled to a voice in the proceedings." *Kane*, 843 F.2d at 639; *see In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (order appointing future claimants' representative), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985). "Additionally, the Court invited any person who had been exposed to Manville's asbestos but had not developed an illness to participate in the proceedings, and two such persons appeared." *Kane*, 843 F.2d at 639–40. The futures' representative participated in all aspects of the original Manville reorganization, and was instrumental in negotiating the terms of the Manville trust and associated injunctions. Congress adopted Judge Lifland's use of a futures' representative when it codified the Manville injunction in Section 524(g) and (h) of the Bankruptcy Code. 11 U.S.C. §§ 524(g)(4)(B)(i), (h)(1)(B) (App. 477a–479a). No direct action plaintiff raised any issue concerning the futures' representative, and among the *amici* supporting Travelers' arguments in this Court are individuals who have served as futures' representatives in scores of asbestos bankruptcies. Finally, as noted above, virtually all of the asbestos claimants who are parties to this appeal voluntarily filed claims with the Manville

* * *

In sum, the Second Circuit's and Respondents' crabbed theory of bankruptcy jurisdiction has no constitutional or statutory basis and would, if adopted by this Court, have disastrous and unforeseeable effects on the ability of the Nation's bankruptcy courts to reorganize troubled enterprises.[9] Respondents ask this Court to trade the virtues of "flexibility and equity built into Chapter 11 of the Bankruptcy Code," *NLRB* v. *Bildisco &*

Trust pursuant to the bankruptcy court's prior orders in this case and voluntarily released Manville's insurers, including Travelers.

[9] Several examples illustrate the potential for unintended consequences. Congress has exercised its power to enact "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, in legislation outside of title 11. One of the most important energy laws enacted since World War II, the Price-Anderson Act, Pub. L. No. 85–256, 71 Stat. 576 (Sept. 2, 1957), establishes procedures for bankruptcy-like judicial proceedings following a catastrophic nuclear accident. The law centralizes claims before an Article III judge, who is given broad power to, *inter alia*, limit the liability of non-debtors and stay execution of court judgments. *Id.* § 4, *codified at* 42 U.S.C. § 2210. Congress cited its power under the Bankruptcy Clause as authority for enacting the legislation. S. REP. NO. 85–296 (1957). It is likewise notable that legislation presently under consideration in response to the current financial crisis depends upon bankruptcy jurisdiction robust enough to address the complexity and interconnectedness of stakeholders in the mortgage crisis (including first lienholders, second lienholders, servicers, underwriters and investors in mortgage-backed securities). In considering Respondents' sweeping statements concerning the limitations of the Bankruptcy Clause, it is wise to tread lightly in an area so fraught with the potential for unintended consequences.

Bildisco, 465 U.S. 513, 525 (1984), for the vice of an artificial limiting boundary that is neither authorized by law nor workable in practice.

CONCLUSION

For the reasons set out above and in the opening brief, Travelers respectfully submits that the Second Circuit's opinion must be reversed and the case remanded for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et. al.*,

Petitioners,

– and –

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF FUTURE CLAIMANTS REPRESENTATIVES IN SUPPORT OF NONE OF THE PARTIES

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STATEMENT OF THE AMICI'S INTEREST[1]

The Amici filing this brief are Eric D. Green, Esquire,[2] Martin J. Murphy, Esquire,[3] Lawrence Fitzpatrick, Esquire,[4] and Walter Taggart, Esquire.[5]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Eric D. Green served as the court-appointed legal representative for future asbestos personal injury claimants in the following cases: (i) *In re Mid-Valley, Inc.*, 305 B.R. 425 (Bankr. W.D. Pa. 2004); (ii) *In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (Bankr. D. Del. 2001); (iii) *In re Babcock & Wilcox Co.*, 274 B.R. 230 (Bankr. E.D. La. 2002); and (iv) *In re Fuller-Austin Insulation Co.*, Case No. 98-2038 (Bankr. D. Del. 1998). He continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the following trusts, established to make payments to present and future tort claimants in the aforementioned cases: the DII Industries, LLC Asbestos PI Trust; the DII Industries, LLC Silica PI Trust; the Federal Mogul U.S. Personal Injury Asbestos Trust; the Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; and the Fuller-Austin Asbestos Settlement Trust.

[3] Martin J. Murphy served as the court-appointed legal representative for future asbestos personal injury claimants in *In re Kaiser Aluminum Corp.*, Case No. 02-10429 (Bankr. D. Del. 2002). He continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust.

[4] Lawrence Fitzpatrick currently serves as the court-appointed legal representative for future asbestos personal (Cont'd)

They were appointed, pursuant to 11 U.S.C. § 524(g), by bankruptcy courts presiding over the chapter 11 cases of asbestos companies, to serve as the legal representatives of future claimants—those who manifest asbestos disease from exposure to the debtor companies' products after the confirmation of a chapter 11 reorganization plan. The basic task of the "Future Claimants Representatives" under the Bankruptcy Code is to ensure that future claimants are treated fairly and similarly to current claimants in the chapter 11 plan. They respectfully submit this *amicus curiae* brief pursuant to Supreme Court Rule 37(3), and they file

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(Cont'd)

injury claimants in the following cases: (i) *In re Global Industrial Technologies, Inc.*, Case No. 02-21626 (Bankr. W.D. Pa. 2002); (ii) *In re North American Refractories Co.*, Case No. 02-20198 (Bankr. W.D. Pa. 2002); and (iii) *In re Pittsburgh Corning Corp.*, Case No. 00-22876 (Bankr. W.D. Pa. 2000). He served as the court-appointed legal representative for future asbestos personal injury claimants in *In re ACandS, Inc.*, 2008 Bankr. LEXIS 2169 (Bankr. D. Del. 2002), and continues to serve as the court-appointed legal representative for future asbestos personal injury claimants for the ACandS Asbestos Settlement Trust.

[5] Professor Walter Taggart served as the court-appointed legal representative for future asbestos personal injury claimants in *In re Pacor*, Case No. 86-03251 (Bankr. E.D. Pa. 1986), and in *In re United States Mineral Products Company*, Case No. 01-2471 (E.D. Pa. 2001). He continues to serve as a member of the Trustees Advisory Committee for the Pacor Settlement Trust and the court-appointed legal representative for future asbestos personal injury claimants for the United States Mineral Products Company Personal Injury Asbestos Trust.

the brief without taking a position in favor of either side on the ultimate merits of this case.

Because channeling injunctions pursuant to Section 524(g) are essential to the task of protecting the interests of the future asbestos claimants, the Future Claimants Representatives have an interest that the bankruptcy courts retain sufficient jurisdiction under 28 U.S.C. § 1334 and power under Section 524(g) to ensure that those channeling injunctions are effective. Section 524(g)(4)(B)(i) mandates the appointment of a Future Claimants Representative as a prerequisite to the issuance of a channeling injunction affecting future claimants. Without the participation of a Future Claimants Representative, a debtor would remain subject to future asbestos liability and would be unable to effectively reorganize. In addition, the Future Claimants Representative has the ability, as a practical matter, to block the issuance of a channeling injunction. Unquestionably, it is the ability to deliver a broad and final channeling injunction that is the primary tool of the Future Claimants Representative in carrying out his or her duties.

The appeal involves the channeling injunction put in place by the 1986 confirmation order in the Manville bankruptcy. The channeling injunction at issue in this appeal was not entered pursuant to Section 524(g). Nonetheless, in construing the *Manville* Confirmation Order, the Second Circuit discussed Section 524(g) extensively. (App. to Pet. Cert. at 29a-31a.)[6] In so doing,

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[6] All citations to "App. to Pet. Cert." refer to the appendix accompanying the petition for certiorari in No. 08-295.

the Second Circuit unnecessarily injected uncertainty about the scope of bankruptcy court jurisdiction under Section 1334 and the power of a bankruptcy court pursuant to Section 524(g) to enter an injunction to channel to a trust certain claims that would otherwise be asserted directly against a debtor's insurers under state tort and contract law. A ruling that creates uncertainty about the scope of such injunctions—and thus about the protection that insurers can receive by agreeing to fund an asbestos compensation trust—will undermine the policy Congress evinced in the plain language of Section 524(g). This Court should remove the cloud of uncertainty the Second Circuit has created. A ruling that upholds bankruptcy courts' broad jurisdiction and power to channel claims against insurers that arise out of or relate to the insurers' provision of insurance to a debtor is necessary to preserve the settled expectations of asbestos debtors and their stakeholders, claimants, and insurers, as well as to encourage insurers to reach the comprehensive settlements that are essential to the funding of asbestos compensation trusts. Unless this uncertainty is removed, the Second Circuit's decision may let loose a flood of asbestos litigation that has in large part been successfully channeled to over 40 asbestos compensation trusts created under Section 524(g), under the supervision of the bankruptcy courts.

SUMMARY OF THE ARGUMENT

This appeal raises issues of great import to the over one million future asbestos claimants whose interests are represented by the Future Claimants Representatives. The ability of such claimants to achieve

timely, fair, and meaningful compensation for the asbestos-related injuries they will suffer over the next decades depends largely on the viability of asbestos compensation trusts of the type at issue in this appeal.

The Future Claimants Representatives have been appointed in bankruptcy proceedings pursuant to Section 524(g) to represent persons who have been exposed to asbestos, and who have not yet brought personal injury claims or lawsuits but will assert such claims once their injuries become manifest. The Future Claimants Representatives are charged by Congress and the federal courts with ensuring that future claimants are treated fairly and similarly to current claimants. The work of the Future Claimants Representatives, and others, has led to the creation of more than 40 asbestos compensation trusts pursuant to Section 524(g). These trusts enable companies responsible for asbestos personal injuries to fully resolve all of their present and future asbestos liabilities, and at the same time provide a dedicated source of funds to compensate current and future claimants. The creation of asbestos compensation trusts has benefited both asbestos claimants and companies seeking to resolve their asbestos-related liabilities and thus remain economically viable and competitive.

Because the Future Claimants Representatives do not have a position as to whether all of the claims Travelers seeks to enjoin under the *Manville* Confirmation Order have a "reasonable nexus" to the Manville estate, they have not filed this brief in support of any party. In particular, the Future Claimants Representatives do not take a position on whether the

bankruptcy court has the jurisdiction and power to issue injunctions that relate to claims against a debtor's insurers arising out of the insurers' provision of coverage to entities *other than the debtor*. The Future Claimants Representatives submit, however, that both Section 1334 and Section 524(g) must be construed to afford bankruptcy courts broad authority to enjoin, in connection with a comprehensive settlement of asbestos-coverage disputes between a debtor and its insurers, claims against the insurers by third parties that arise out of or relate to the insurers' provision of insurance to the debtor. A restrictive ruling that would preclude the bankruptcy courts from issuing such injunctions would run counter to well-established case law interpreting Section 1334 and the language of Section 524(g), would disturb settled expectations, and most damagingly, would discourage insurers from entering into settlements that provide funding for asbestos compensation trusts and thereby compensate asbestos plaintiffs for their injuries. The results would be fewer asbestos compensation trusts and a great increase in asbestos-related litigation in state and federal courts—a huge and unnecessary step backwards.

The Second Circuit's discussion of Section 524(g) (even though that statute was not directly at issue in *Manville*) gives rise to a concern that this case could result in an unduly narrow or ambiguous interpretation of Section 1334 and Section 524(g), which in turn would undermine the effectiveness of Section 524(g). In this brief, the Future Claimants Representatives show that this Court and the lower courts have consistently adopted a broader view of jurisdiction under Section

1334 than did the Second Circuit below. In addition, the Second Circuit suggested a narrower application of channeling injunctions to claims against insurers under Section 524(g) than the plain language of that statute mandates. In particular, Section 524(g) does not make the distinction between "derivative" and "non-derivative" claims upon which the Second Circuit based its decision. Whether claims against a third party can be subject to a channeling injunction pursuant to Section 524(g) depends on the specific claims, relationships, and facts and circumstances before the court in each bankruptcy proceeding. Because relationships among debtors and their insurers and other third parties take a great variety of forms, the application of Section 524(g) to third-party claims requires a fact-intensive, case-by-case analysis. This Court should not "amend" Section 524(g) by adopting the "derivative" versus "non-derivative" distinction that the Second Circuit has created. More fundamentally, this Court should do nothing to narrow the bankruptcy courts' jurisdiction to craft, when appropriate, channeling injunctions to bar claims relating to the debtor or arising out of its conduct, including claims against the debtor's insurers relating to or arising out of the insurers' provision of insurance to the debtor.[7]

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[7] The Amici take no position as to whether the jurisdiction and power of the bankruptcy court would extend to the issuance of injunctions that would seek to channel claims against the debtor's insurers related to the insurers' provision of coverage to entities other than the debtor.

ARGUMENT

I. Through Section 524(g), Congress Affirmed the Power of the Bankruptcy Courts to Create Asbestos Compensation Trusts for the Benefit of Future Claimants.

A. Future Claimants and Future Claimants Representatives

Foundational principles of bankruptcy law require that debtors receive a "fresh start" upon emerging from bankruptcy, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006), and that creditors of the same class be treated equally, *Begier v. IRS*, 496 U.S. 53, 58 (1990). Implementation of these principles is particularly difficult when the debtor faces potential personal-injury claims arising from exposure to asbestos, since the resulting latent diseases may not manifest themselves for years, or even decades, after exposure. Thus, individuals who have been injured by exposure to asbestos but show no symptoms at the time a bankruptcy petition is filed by the responsible party—i.e., "future claimants"—cannot recognize themselves as claimants in time to seek relief from the debtor.

Congress addressed this latency problem when it crafted Section 524(g) in 1994. Preventing a viable business from being swamped by asbestos claims while at the same time protecting the rights of the asbestos-exposure victims is a delicate endeavor, with the risk of an improvident resolution being borne almost entirely by the future claimants. Congress recognized that, absent a party with real authority to negotiate for, and

make agreements binding on, future claimants, the resulting plan of reorganization of an asbestos defendant could be skewed at the expense of the claimants who are yet to appear.

For example, if the debtor is allowed to channel its asbestos liability to a claims-resolution trust that is acceptable to present claimants but does not adequately provide for future claimants, the future claimants would be left without recourse when the trust's corpus is ultimately exhausted. On the other hand, if the debtor is not permitted to channel its asbestos liability away from its business, the specter of future asbestos-related claims arising from the business's past operations would cripple its ability to raise capital, reducing the value available for future claimants. Finally, if the debtor fails to resolve both present and future asbestos liability, then, in all likelihood, the debtor will be liquidated piecemeal by present claimants, again leaving potentially nothing for those whose injuries appear in the years ahead. Thus, it is imperative to the future claimants that any resolution of an asbestos bankruptcy case provide for a trust with sufficient resources, and adequate protections, to ensure that the future claimants will not be short-changed. Because it is impossible for future claimants to protect their own interests, Congress fashioned Section 524(g) of the Bankruptcy Code to provide for the appointment of a Future Claimants Representative to protect the future claimants' interests in the bankruptcy process. 11 U.S.C. § 524(g)(4)(B)(i).

Although the total number of future claimants is uncertain, it has been estimated that there will be

between 1.5 million and 2.5 million future claims for asbestos-related injuries against the Manville trust alone. Stephen J. Carroll et al., RAND Institute for Justice, *Asbestos Litigation* 114 (2005), *available at* http://www.rand.org/Pubs/documented_briefings/2005/DB397.pdf. As of summer 2004, 73 asbestos defendants had filed for bankruptcy. *Id.* at 109. More have filed since then. Based on the number of asbestos bankruptcy cases and the asbestos products with which the debtors were associated, the persons already appointed and serving as Future Claimants Representatives likely represent all, or nearly all, of the future claimants.

B. Asbestos Compensation Trusts under Section 524(g)

Section 524(g) of the Bankruptcy Code makes clear that bankruptcy courts have jurisdiction (1) to establish trusts for the benefit of future claimants with asbestos-related injuries ("asbestos compensation trusts"), and (2) to issue "channeling injunctions" preventing future asbestos claimants from taking legal action against any entity—including insurers—other than the asbestos compensation trust established in the chapter 11 reorganization of the relevant debtor. Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994). An asbestos compensation trust must "assume the liabilities of a debtor" that has been named in a suit for asbestos-related injuries, must "be funded in whole or in part by the securities of 1 or more debtors" involved in the reorganization plan under which the asbestos compensation trust is created, and must have the ability to exercise "a majority of the voting shares of" each debtor, the debtor's parent,

or a subsidiary that is also a debtor. 11 U.S.C. § 524(g)(2)(B)(i). Additionally, before a channeling injunction can be entered, the bankruptcy court must appoint a Future Claimants Representative to protect the interests of the future claimants and must determine that the injunction is "fair and equitable" to potential future claimants. 11 U.S.C. § 524(g)(4)(B).

The creation of asbestos compensation trusts has benefited both injured claimants and debtors, while also promoting judicial efficiency. By permitting a debtor to cleanse itself of asbestos-related liabilities through bankruptcy, Congress has enabled such debtors to truly obtain a fresh start through bankruptcy and continue to operate. Indeed, as a result of Supreme Court decisions, Section 524(g) is the *only* means by which a company can fully resolve all of its present and future asbestos liabilities.[8]

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[8] Since the enactment of Section 524(g), this Court has rejected at least two proposed class action settlements that sought to resolve future asbestos claims: *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem*, this Court noted that Congress had not adopted rules to permit the adjudication of asbestos claims on behalf of future claimants through a class action, and questioned whether "class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* at 628-29.

Subsequently, in *Ortiz*, this Court observed that "serious constitutional concerns" were implicated by using class action settlements in such a manner, 527 U.S. at 845, noting in particular that application of Rule 23(b)(1)(B) to resolve mass torts implicated the due process rights of absent future

(Cont'd)

In the absence of Section 524(g), each future claimant would likely have to seek redress in state or federal courts, which is a costly and inefficient method of resolving such claims, and—more importantly—is meaningful only if assets of the defendant business still exist at the time a future claimant manifests an injury. The Bankruptcy Code furthers the interests of future claimants by mandating the appointment of a Future Claimants Representative to protect their interests in the debtor's reorganization, ensuring that to the fullest extent possible, funds exist to satisfy the claims of the future claimants when they ripen, and providing that asbestos compensation trusts are at least partially funded by the debtor and its insurers, thereby allowing future claimants to benefit from the debtor's fresh start under bankruptcy law.

C. Asbestos Compensation Trusts Accomplish Their Goals.

Empirical evidence shows that asbestos compensation trusts improve the economic position of future claimants. By way of example, through negotiations the Future Claimants Representative in the Halliburton bankruptcy *(In re Mid-Valley, Inc.)* succeeded in increasing over tenfold the value of the

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(Cont'd)

claimants, *id.* at 845-47, whose rights, in contrast, receive greater protection under the Bankruptcy Code. Such concerns led the Court to find that the *Ortiz* class certification was defective. Much as it had in *Amchem*, the Court focused on the "divergent interests of the presently injured and future claimants." *Id.* at 853.

cash component of the res with which the asbestos compensation trust was funded. Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down but Not Out*, 63 N.Y.U. Ann. Surv. Am. L. 727, 768-69 (2008). In addition, the res that was agreed to for the asbestos compensation trust included almost 60 million shares of Halliburton stock. *Id.* at 769. Between December 2002, when the parties first agreed on the res, and the time of the confirmation hearing, the stock of Halliburton had increased in value by 50%. *Id.* By the time the Halliburton stock was sold by the trust, the value of the stock had more than doubled, and the sale proceeds were sufficient to cover the projected liabilities over the life of the trust. *Id.* at 770 n.195. Future claimants will receive full compensation for their injuries, and the debtor was able to recover its credit status in the capital markets and emerge from the bankruptcy proceeding as a robust, competitive entity. This is what is meant by a "win-win" solution.

D. Insurers Should Remain Eligible for Protection Under Section 524(g).

In deciding this case, the Court must be careful not to eviscerate Section 524(g) by limiting bankruptcy court jurisdiction such that it would no longer extend to plaintiffs asserting against a debtor's insurers claims that arise out of the insurers' provision of coverage to the debtor. In many asbestos bankruptcies, the most significant asset of the debtor available to compensate persons injured by asbestos is the debtor's insurance. Even in bankruptcies in which the debtor has significant other assets, the proceeds of the debtor's liability insurance policies are often the major asset that is used

to compensate persons who have been exposed to the debtor's asbestos. For example, the asbestos compensation trust that resulted from the Babcock & Wilcox Company bankruptcy cases has been funded, to date, with nearly $1 billion of insurance settlement proceeds.[9] Such proceeds and policies arise out of and relate directly to the debtor's activity in exposing claimants to asbestos and the associated risks of injury. The ability of insurers to protect themselves from asbestos liability, following the contribution of their insurance policies to an asbestos compensation trust and the confirmation of a plan of reorganization, has been critical to the success of reorganizations employing Section 524(g).

Liability insurers are willing to enter into comprehensive settlements in connection with asbestos-related bankruptcy proceedings only because, pursuant to Section 524(g), the insurers can obtain channeling injunctions barring actions against them that arise out of or relate to the debtor's liability. Without the ability to offer insurers the benefits of channeling injunctions—finality and protection from further claims—Future Claimants Representatives would have little leverage in dealing with insurers and little ability to negotiate favorable insurance settlements for the benefit of future

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[9] *See In re Babcock & Wilcox Co.*, Case No. 00-10992 (Bankr. E.D. La. 2002), Summary Disclosure Statement as of November 10, 2005 Under Section 1125 of the Bankruptcy Code with Respect to the Joint Plan of Reorganization as of September 28, 2005, as Amended Through November 10, 2005, Proposed by the Debtors, the Asbestos Claimants' Committee, the Future Asbestos-Related Claimants' Representative, and McDermott Incorporated [Docket No. 6913], at p. 13.

claimants, including accelerated payments to properly fund asbestos compensation trusts. Thus, the Section 524(g) process, a process that has proven highly effective in efficiently and fairly resolving mass asbestos liabilities, would be seriously undermined by a ruling that creates uncertainty about the post-bankruptcy protections afforded to insurers that agree to fund asbestos compensation trusts.

II. Section 1334 Provides Bankruptcy Courts with Subject Matter Jurisdiction to Issue Injunctions to Preclude Third-Party Actions Against Insurers, Where the Outcomes of Such Actions Could Have a "Conceivable Effect" on the Bankruptcy Estate or Would Otherwise Affect the Administration of the Estate.

A. Section 1334(b) Must Be Construed Broadly Under Supreme Court and Other Federal Case Law.

The Second Circuit concluded that the bankruptcy court lacks both the jurisdiction under Section 1334 and the power under Section 524(g) to enjoin third-party claims against a debtor's insurer. This startling conclusion rests on a radically narrow construction of bankruptcy court jurisdiction that improperly constrains the "related to" clause of Section 1334(b). The Second Circuit's conclusion contravenes the broad scope of bankruptcy court jurisdiction that this Court and other federal courts have repeatedly recognized. It also undermines the congressional intent that Sections 1334(b) and 524(g) be interpreted broadly. Such constrained interpretation, if allowed to stand, will

prevent the full application of Section 524(g) as a tool to resolve asbestos-related bankruptcies and compensate asbestos claimants.

Article I of the Constitution vests Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Pursuant to that grant, Congress conferred upon the district and bankruptcy courts broad jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). In *Celotex Corp. v. Edwards*, this Court, construing the breadth of "related to" jurisdiction under the statute, approved the proposition that "'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (*quoting Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Jurisdiction pursuant to Section 1334(b) exists if a matter is related to the bankruptcy, whether or not the matter arises out of the bankruptcy. *See Feld v. Zale Corp.*, 62 F.3d 746, 752 (5th Cir. 1995) ("to ascertain whether jurisdiction exists, 'it is necessary only to determine whether a matter is at least "related to" the bankruptcy.'" (*quoting In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))). Courts have established that the jurisdictional requirement of Section 1334(b) is met when the "outcome of [the] proceeding *could conceivably have any effect* on the estate being administered in bankruptcy." *Pacor, Inc.*, 743 F.2d at

994, *quoted in Celotex Corp.*, 514 U.S. at 308 (emphasis added). *See also In re Walker*, 51 F.3d at 569; *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008). "Related to" jurisdiction has also been framed in terms of whether the claims could potentially affect the handling or administration of the estate. *See In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996). These tests for relatedness are consistent with the broad jurisdictional mandate of Section 1334(b). *See, e.g.*, 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii] (noting that courts generally "seem to recognize the importance of a generous definition of 'related to' jurisdiction in encouraging the expeditious and efficient administration of bankruptcy cases").

In *Celotex*, for example, this Court affirmed the jurisdiction of the bankruptcy court to issue an injunction barring a suit against Celotex's surety, because allowing asbestos plaintiffs to proceed with the suit would have hampered the bankruptcy court's ability to foster a comprehensive settlement with all of Celotex's insurers. *See Celotex*, 514 U.S. at 309-10. Similarly, in *Dow Corning*, the Sixth Circuit held that the bankruptcy court and district court had jurisdiction to enjoin breast-implant suits against the debtor's co-defendants because, if the claims against the co-defendants were allowed to continue, they would have given rise to claims against the debtor for contribution and common law indemnity, and therefore would have "affect[ed] the size of the [bankruptcy] estate." *Dow Corning*, 86 F.3d at 494. The court in *Dow Corning* also observed that

automatic liability (i.e., where a judgment has already been rendered) was not a prerequisite for "related to" liability, noting:

> "A key word in [the] test is conceivable. Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on the debtor's rights, liabilities, options, or freedom of action or the handling and administration of the bankrupt estate."

Dow Corning, 86 F.3d at 491 (*quoting In re Marcus Hook Dev. Park Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)) (internal quotation marks omitted; alteration by *Dow Corning* court).

In *In re Drexel Burnham Lambert Group, Inc.*, the Second Circuit held that the bankruptcy court had jurisdiction to enjoin suits against the debtor's former directors and officers because the injunction facilitated a settlement agreement and thus played an important part in the debtor's reorganization plan. 960 F.2d 285, 293 (2d Cir. 1992). *See also In re Metromedia Fiber Network*, 416 F.3d 136, 141 (2d Cir. 2005) ("a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's Reorganization Plan" (*citing Drexel, supra*)); *Munford v. Munford*, 97 F.3d 449, 453-54 (11th Cir. 1996) (upholding bankruptcy court's jurisdiction to enjoin suits against a third party, as part of a settlement between the debtor and the third party, where the settlement offer was conditioned on the court's entry of the injunction; "related to" jurisdiction existed because

the non-settling defendants' contribution and indemnity claims affected the ability of the estate to receive its settlement).

B. The Second Circuit Applied the Test of "Relatedness" Too Narrowly.

Twenty years after affirmance by the same court on a direct appeal, a different panel of the Second Circuit opened a door previously locked shut, when it reversed course and concluded that the *Manville* bankruptcy court had "enjoin[ed] claims over which it had no jurisdiction." (App. to Pet. Cert. at 18a.) The Second Circuit's decision narrowed the "relatedness" test in contravention of the statutory grant, and policy of broad construction, of bankruptcy court jurisdiction. In so doing, it undermined the policy rationale and effectiveness of Section 524(g).

In essence, the Second Circuit found that there was no relatedness jurisdiction because the third-party plaintiffs "make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate." (*Id.* at 29a.) The res of the debtor's estate, however, is not the limit of bankruptcy court jurisdiction. The Second Circuit distinguished this case from cases in which jurisdiction was found to enjoin third-party claims that necessarily sought recovery from the same insurance policies that were in the possession of the bankruptcy estate. (*Id.* at 21a-25a.) But neither of the distinguished cases stands for the proposition that relatedness jurisdiction exists *only* when the third-party

plaintiff is seeking recovery from insurance policies that are property of the bankruptcy estate.[10]

The Second Circuit also engaged in an overly narrow interpretation of "relatedness" by looking to the link between the substantive legal claims asserted by the debtor and the non-debtors against the insurance companies. In this regard, the Second Circuit looked to whether the third party alleged a claim that was founded on a legal duty independent of the one asserted by the debtor. According to the Second Circuit, the district court should have looked to the law of the states where the third-party claims arose, to determine whether Travelers had an "independent legal duty in its dealing with plaintiffs." (*Id.* at 23a–24a.) Along these lines, the Second Circuit asked whether Travelers owed a duty to the third-party claimants independent of its contractual obligations to indemnify those injured by the tortious conduct of Manville. According to the court, "[i]f such a duty exists, then the fact that it arises from a common nucleus of operative facts involving Travelers and

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[10] In attempting to distinguish *MacArthur* and *Davis*, the Second Circuit incorrectly recast a sufficient condition as a necessary one. There is no disagreement among courts that federal jurisdiction exists over a claim seeking direct recovery from the res of the bankruptcy estate. But it is also true that, as recognized in *Drexel* and *Metromedia*, injunctions that "play[ ] an important part in the debtor's reorganization plan" provide a sufficient basis for jurisdiction. *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141 (*quoting In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 293). In this case—at least to the extent that the injunction in question is related to the insurers' coverage of Manville—the requisite standard has been met.

Manville . . . is of little significance from a jurisdictional standpoint." (*Id.* at 32a.) But the Second Circuit erred in implying that jurisdiction does not exist if there is an "independent legal duty" on which the third-party claims are premised. That is because the question of whether an independent legal duty exists is separate from and not determinative of the question of relatedness: whether the claim *would have a conceivable effect* on the bankruptcy estate.

Here, it is unquestionable that the third-party claims at issue—at least to the extent such claims are related to insurers' provision of insurance coverage to the debtor—have an impact on the bankruptcy estate: they directly affect settlements that the insurers will enter into with debtor policyholders and under which the insurers will contribute to the asbestos compensation trust. These settlements are critical to the establishment and success of the trust because they effectively accelerate the insurers' coverage for asbestos claims that might not be made against the debtor or the trust for years into the future. Without them, there may be no trust and no reorganized debtor. Insurers enter into these settlements because, pursuant to Section 524(g), they benefit from injunctions by the bankruptcy court barring all present and future actions against them that arise from or relate to the debtor's liability. Without broad injunctive protection, insurers will not participate.

By applying the test of relatedness so narrowly, the Second Circuit jeopardized important policy interests recognized by Congress in enacting Section 524(g). As the Second Circuit itself recognized in this case,

Section 524(g) "provides a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liability." (App. to Pet. Cert. at 33a-34a (*citing* H.R. Rep. 103-835, at 40, as reprinted in 1994 U.S.C.C.A.N. 3340, 3348 (1994)).) Section 524(g) thus advances the purpose of chapter 11 by "facilitating the reorganization and rehabilitation of the debtor as an economically viable entity." (*Id.* at 34a.) This policy will be undermined by a ruling that casts doubt on—not to mention one that punches holes in—the protection liability insurers can receive against end-run, so-called direct claims.

To construe "related to" jurisdiction broadly does not imply there are no limits to the jurisdictional scope of Section 1334(b). The jurisdiction does not extend to those cases where there is no "reasonable nexus" to the bankruptcy estate. 1 *Collier on Bankruptcy* ¶ 3.01[4][c][ii][B]; *see also Dow Corning*, 86 F.3d at 488. But "related to" jurisdiction will almost always be broad enough to encompass injunctions against claims relating to an insurer's provision of coverage to the debtor, whether those claims sound in tort, statute, or some other duty, because the "reasonable nexus" between the debtor's estate and those claims will almost always be present. The Amici submit that the "reasonable nexus" test has been met with respect to the claims relating to insurers' provision of insurance to a debtor. This does not suggest that "related to" jurisdiction would necessarily provide a basis for a bankruptcy court to enjoin claims based on coverage an insurer provided to an entity other than the debtor. In the case of a claim arising out of the insurance coverage of a non-debtor,

the bankruptcy court's jurisdiction depends on a searching inquiry into the facts and circumstances concerning the basis of the "reasonable nexus."

III. Whether a Third-Party Claim Against an Insurer Can Be Subjected to a Channeling Injunction Pursuant to Section 524(g) in the First Instance Is a Fact-Intensive Inquiry That Should Be Left to the Sound Discretion of the Bankruptcy Courts and Thus Reviewed Under a Liberal Standard to Effectuate Congress's Broad Mandate Under Section 524.

A. Congress Intended That Section 524(g) Cover a Broad Array of Claims Against Insurers, Not Just Claims Against a Debtors' Insurance Policy.

Contrary to the Second Circuit's holding, a claim may fall within the purview of Section 524(g) even though the claim is based on the insurer's own independent state law obligations, and even though the claim seeks recovery from the insurer's own assets (rather than the proceeds of the insurance policies). Section 524(g) was modeled on the 1986 injunction issued by the bankruptcy court in *Manville*. *See* 140 Cong. Rec. H10752, at H1765 (daily ed. October 4, 1994). Indeed, in Section 524(h), Congress ratified the injunction that had been issued in *Manville*. That 1986 injunction—like Section 524(g)—precludes third-party actions against insurers not only for claims that are based upon the insurance policy (i.e., claims for policy proceeds) but also, more broadly, claims that arise out of or relate to the policies.

The text of Section 524(g) is clear that injunctions protecting non-debtors may bar lawsuits seeking to recover from the non-debtors' own funds (rather than funds that are part of the debtor's estate), and that are brought pursuant to state law doctrines. A debtor's corporate parents, affiliates, officers, and lenders (along with insurers) are expressly eligible for third-party protection under Sections 524(g)(4)(A)(ii)(I)-(IV). As to a debtor's insurers, Section 524(g)(4) allows for broad protection. It states in pertinent part:

> Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third parties arises by reason of . . . (III) the third party's provision of insurance to the debtor. . . .

Section 524(g)(4)(A)(ii)(III).

The foregoing requirements are satisfied where a suit seeks to hold an insurer liable because of its provision of coverage to the debtor, even if the claimant alleges that the insurer had an independent state law duty toward the claimant. Although no such theory of an independent state law duty apparently has been successful, the Second Circuit's decision provides fodder for creative lawyers to invent a claim or theory to attempt to circumvent a channeling injunction. The

mere threat that circumvention could be so easily achieved would itself be damaging to the policy and purposes behind Section 524(g).[11] Plaintiffs alleging that an insurer of the debtor, by reason of its status as the debtor's insurer, had an independent "duty to warn" them of the dangers of the debtor's product are seeking to hold the insurer liable for the asbestos-related injury caused by their exposure to the debtor's product, and thus, in the language of Section 524(g)(4)(A)(ii), to hold the insurer "indirectly liable for the conduct" of the debtor. Claims based on "bad faith" and state trade practice laws are seeking to hold the insurer liable for the manner in which it, as required by its insurance policy, defended the debtor, and thus are seeking to hold the insurer "indirectly liable" for the "claims against" the debtor, within the meaning of Section 524(g). 11 U.S.C. § 524(g)(4)(A)(ii).

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[11] In addition, exempting claims premised on an "independent state law duty" from the bankruptcy court's power to channel claims pursuant to Section 524(g) invites circumvention that offends the Supremacy Cause, U.S. Const. art VI, cl.2. Under the Second Circuit's holding, creative lawyers can sidestep a final order of the federal bankruptcy court by pleading that a plaintiff was owed an independent state law duty. This would make state courts the arbiters of whether a claim was subject to a prior federal bankruptcy court order. Under the Supremacy Clause, however, it is the federal bankruptcy court, and not the state courts, that the Constitution empowers to determine the scope of federal orders. *Perez v. Campbell*, 402 U.S. 637, 649-51 (1971) (outcome codified by Congress in 11 U.S.C. 525(a)); Brief for Petitioners, *The Travelers Indemnity Co. v. Bailey*, No. 08-295, at 39-43 (U.S. January 26, 2009).

If actions cannot be enjoined under Section 524(g), merely because the plaintiffs are not seeking the policy proceeds or are allegedly basing their claims on some *ex contractu* or "independent state tort law" obligation, the incentives that Congress established for insurers to settle up-front will be removed, and more post-bankruptcy third-party actions will be encouraged, leading to an inequitable distribution of funds among claimants. A weakening of the bankruptcy court's power to issue an injunction under Section 524(g) risks upsetting settled expectations with respect to Section 524(g) injunctions that have already been issued in favor of insurers in asbestos-related bankruptcies, and will ultimately mean much less money for present and future asbestos victims. It is essential to the interest of present and future asbestos claimants to be able to consummate overall up-front settlements of insurance disputes, including the ability, where appropriate, to seek a settlement encompassing *ex contractu* and tort recoveries from the insurers.[12]

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[12] The fact that Section 524(g) conferred the bankruptcy courts with this power further supports the argument that Section 1334(b) provides broad jurisdiction to do so. *See* Section II, *supra*. Congress would not have enacted Section 524(g) had it not been of the view that bankruptcy courts possess the subject matter jurisdiction under Section 1334(b) to issue the injunctions authorized by Section 524(g). *Cf. United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.") Accordingly, the scope of "related to" jurisdiction in Section 1334 must be construed to be at least as extensive as the reach of Section 524(g).

B. Section 524(g) Does Not Speak of "Derivative" and "Non-Derivative" Claims.

In reaching its holding that the claims in the "direct action" suits "are outside the limits of § 524," the Second Circuit relied on a distinction between "derivative" and "non-derivative" claims. (App. to Pet. Cert. at 34a-35a.) Neither of those terms nor the distinction they embody is found in the text of Section 524(g) itself, the Congressional Record, or other legislative history surrounding the enactment of Section 524(g). The text of Section 524(g) is not so limited, and the judicial gloss the Second Circuit applied does violence to that text as well as to the congressional intent. Therefore, in accordance with the plain language of Section 524(g), this Court should remand this matter to the bankruptcy court for further proceedings with an instruction that the text of 524(g) provides the bankruptcy court with the power to enjoin third-party suits to the extent that the suits relate to the insurers' provision of coverage to a debtor. Only by following the text of the statute can the bankruptcy court faithfully apply the broad power that Congress so clearly intended to afford bankruptcy courts in the context of asbestos bankruptcies.[13]

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[13] The statutory text does not include the terms "derivative" and "non-derivative." It is a long-standing and cardinal rule that in interpreting a statute, one looks to the plain language of the statute to determine its intent.

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating

(Cont'd)

Even if Section 524(g) were ambiguous, and it is not, there would be no basis for the "derivative" versus "non-derivative" distinction the Second Circuit employed. Although the Second Circuit suggested that Congress intended in enacting Section 524(g) to leave "non-derivative" claims beyond the reach of channeling injunctions, the Second Circuit provided no reference to the Congressional Record or any other statutory history that would support this finding of alleged intent. In fact, the Congressional Record is devoid of any reference to the "derivative" versus "non-derivative" distinction that the Second Circuit has determined was so clearly intended.[14] The Second Circuit's reliance on

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> names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Caminetti v. United States, 242 U.S. 470, 490 (1917) (interpreting the White Slave Traffic Act). Although this Court has had to issue periodic reminders, this rule of statutory interpretation remains paramount. *See, e.g., BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." (alteration in original) (internal citations removed)).

[14] *See* 140 Cong. Record H10752, at H10765. The Congressional Record also reveals no concern regarding the bankruptcy court's efforts to extend as broad an injunction as possible to Manville's insurers.

(Cont'd)

its impression of congressional intent has no grounding and is not a substitute for the plain language of Section 524(g).

The source of the extra-statutory "derivative" nomenclature is not statutory history, but rather a borrowing of dicta from the Third Circuit decision in *In re Combustion Eng'g*, 391 F.3d 190 (3d Cir. 2004). The Second Circuit's reliance on *In re Combustion Eng'g* to determine congressional intent is misplaced. In that case, the Third Circuit used the term "derivative" in a different context from the one in which the Second Circuit employed it below, and the Third Circuit's analysis does not reveal any evidence of congressional intent that would support the Second Circuit here.

In *In re Combustion Eng'g*, the Third Circuit determined that claims alleged against two of the

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> "To those companies willing to submit to the stringent requirements in this section designed to ensure that the interests of asbestos claimants are protected, the bankruptcy courts' injunctive power will protect those debtors and certain third parties, *such as their insurers*, from future asbestos product litigation of the type which forced them into bankruptcy in the first place."

140 Cong. Rec. S4521, S4523 (daily ed. April 11, 1994) (statement of Sen. Brown) (emphasis added). The committee reports similarly fail to discuss the limitation of section 524(g) based on a "derivative" distinction. *See* S. Rpt. No. 102-279, at 42 (1992); H Rpt. No. 103-835, at 52-53.

debtor's non-bankrupt affiliates, Lummus and Basic, could not be channeled to the asbestos trust under "related to" jurisdiction or the "equitable powers" available under Section 105(a). *Id.* at 224-38. In reaching this decision, the Third Circuit found that the claims against Lummus and Basic arose "from different products, involved different asbestos-containing materials, and were sold to different markets." *Id.* at 231. Moreover, the Third Circuit found that "the lack of indemnification obligations . . . , the lack of derivative liability or unity of interest . . . , the minimal corporate affiliation of Combustion Engineering with Lummus and Basic, and the indirect effects on the Plan [of reorganization]" precluded the application of a channeling injunction under Section 105(a) to the claims against Lummus and Basic. *Id.* at 233. The Third Circuit did not analyze what made the claims "derivative" or "non-derivative," or how that analysis would affect the application of Section 524(g). Indeed, because neither the bankruptcy court nor the district court had made "explicit findings whether the § 524(g) requirements were satisfied with respect to the channeling injunction as applied to the independent, non-derivative claims against Basic and Lummus" (*id.* at 237-38), an analysis of the application of Section 524(g) to claims against Basic and Lummus would have been misplaced.

More fundamentally, the Third Circuit's decision in *In re Combustion Eng'g* provides no basis for the Second Circuit's finding below that Congress intended to limit the ambit of Section 524(g) injunctions to actions "against third parties to those where a third party has derivative liability for the claims against the debtor." (App. to Pet. Cert. at 34a (*quoting In re Combustion*

Eng'g, 391 F.3d at 234).) Although the Third Circuit referred, in a footnote, to congressional intent to limit the injunction mechanism "to third-party actions against non-debtors in which the liability alleged was derivative of the debtor[,]" the two sources cited by the Third Circuit do not demonstrate that intent. *In re Combustion Eng'g*, 391 F.3d at 235 n.47 (*citing* 140 Cong. Rec. H10752, H10765; *MacArthur Co. v. Johns-Manville*, 837 F.2d 89, 92-93 (2d Cir. 1988)). The portions of the Congressional Record that the Third Circuit cites do not discuss "derivative" or "non-derivative" claims. Likewise, although *MacArthur Co.* used the adjective "derivative" to describe claims by Manville's insured vendor against Manville's insurers, it provides no insight as to Congress's intent in enacting Section 524(g) six years later.

Moreover, in seizing upon the "derivative" versus "non-derivative" distinction to support its analysis, the Second Circuit chose terms that have multiple legal meanings, some of which can be opaque.[15] Thus, not only is the distinction not supported by statute, it adds murkiness to precise statutory language. Although the "derivative" versus "non-derivative" distinction may

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[15] For example, in corporate law, courts continue to struggle with the distinction between "derivative" and "direct" stockholder claims. *See, e.g., Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1035-36 (Del. 2004) (describing the various tests that have been employed for determining whether an action is direct or derivative). Likewise, in the copyright context, even though Section 101 of Title 17 defines a "derivative" work, parties continue to litigate the contours of the term. *See, e.g., Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1299-1300 (11th Cir. 2008).

serve as a useful shorthand in some situations, it should not be grafted onto Section 524(g) as a test to determine a bankruptcy court's power to enjoin asbestos claims against the debtor's insurers.

The Second Circuit remanded this matter to the bankruptcy court to "examine whether, in light of [the Second Circuit's] opinion, it had jurisdiction to enjoin any of the instant claims." (App. to Pet. Cert. at 36a.) This Court should remand this matter with an instruction that, according to the text of Section 524(g) and not the "derivative" versus "non-derivative" analysis set forth in the Second Circuit opinion, the bankruptcy court has the authority to enjoin the third-party suits to the extent that the suits relate to insurers' coverage of a debtor, regardless of the legal theory on which the claim may be based and regardless of whether the claim seeks recovery beyond the insured's policy limits or the res. Because the reach of injunctions issued pursuant to Section 524(g) is broad, and there exists a wide variety of relationships between debtors and their insurers, the application of Section 524(g) to claims beyond that point must involve a context-specific and fact-intensive inquiry. That inquiry should be carried out by following the language of Section 524(g), not short-circuited by the "derivative" versus "non-derivative" test that the Second Circuit needlessly created.

CONCLUSION

Without taking a position on the ultimate merits of this case in favor of either side, Amici Curiae Eric D. Green, Martin J. Murphy, Lawrence Fitzpatrick, and Walter Taggart file this brief because they believe that in reaching the result below, the Second Circuit too narrowly interpreted the bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 1334 and the bankruptcy court's power to issue channeling injunctions under 11 U.S.C. § 524(g). Accordingly, the Amici Curiae respectfully request that this Court remand this matter for further proceedings consistent with an instruction that the bankruptcy court's broad jurisdiction under § 1334 and power under § 524(g) encompasses the jurisdiction and power to issue injunctions that relate to claims against insurers arising out of or relating to policies insurers issued to a debtor—whether those claims arise in tort, statute, or otherwise. The Amici Curiae take no position, however, as to whether the bankruptcy court's jurisdiction under § 1334 and power under § 524 extend to injunctions that relate to claims against Travelers arising out of Travelers' provision of coverage to entities other than Manville.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, ET AL.,

Respondents.

(caption continued on inside front cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN SUPPORT OF RESPONDENTS FOR *AMICI CURIAE* JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ERWIN CHEMERINSKY, INGRID HILLINGER, GEORGE W. KUNEY, CHARLES W. MOONEY, JR., THERESA J. PULLEY RADWAN, KEITH SHARFMAN, MICHAEL D. SOUSA, ETTIE WARD, AND ROBERT M. ZINMAN

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—v.—

PEARLIE BAILEY, ET AL.,

Respondents.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law and the subject matter jurisdiction of the bankruptcy courts.[2] They are keenly interested in this appeal because it provides an opportunity for the Court to resolve the uncertainty among the lower courts as to whether the release in chapter 11 plans of reorganization of claims against non-debtors, for which the debtor has no liability, are within the scope of bankruptcy jurisdiction under the "related to" portion of 28 U.S.C. § 1334(b).

By this *pro bono* brief in support of Respondents, the *Amici* offer their analysis of the issue to provide what assistance it may be to the Court as it considers this important issue. The *Amici* believe that unique aspects of their analyses demonstrate that

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[1] The *Amici* file this brief with the written consent of all parties. No counsel for a party has authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] The *Amici* are Jagdeep S. Bhandari, Professor of Law, Florida Coastal School of Law; Susan Block-Lieb, Professor of Law, Fordham Law School; Erwin Chemerinsky, Dean and Distinguished Professor, University of California, Irvine School of Law; Ingrid Hillinger, Professor of Law, Boston College School of Law; George W. Kuney, Professor of Law, University of Tennessee College of Law; Charles W. Mooney, Jr., Charles A. Heinbold, Jr. Professor of Law, University of Pennsylvania Law School; Theresa J. Pulley Radwan, Professor of Law, Stetson University College of Law; Keith Sharfman, Professor of Law, Marquette University Law School; Michael D.Sousa, Professor of Law, University of Denver College of Law; Ettie Ward, Professor of Law, St. John's University School of Law; and Robert M. Zinman, Professor of Law, St. John's University School of Law.

Congress could not have intended § 1334(b) to extend jurisdiction to a bankruptcy court to include in a chapter 11 confirmation order provisions permanently enjoining and releasing state law causes of action against a non-debtor based solely on its own wrongdoing, for which no recovery could be had from the chapter 11 debtor, its estate, or its insurance policies. Even if so intended, the *Amici* urge that a bankruptcy court would, by authorizing such provisions, violate the Fifth and Seventh amendment rights of the holders of these independent causes of action.

Like the Second Circuit Court of Appeals in its 1992 decision dealing with efforts to resurrect the Manville trust after it ran out of money scarcely two years after plan confirmation in 1986, and again in its decision below, the *Amici* are mindful of the extraordinary efforts made in the Manville bankruptcy case to compensate victims of exposure to its asbestos. The *Amici*, however, also recognize the importance of living by the rules of law, including the limitations of jurisdictional statutes, and the wisdom of turning back efforts to bend legal rules in order to achieve a worthy goal. *See In re Joint Eastern and Southern District Asbestos Litigation*, 982 F.2d 721, 750-51 (2d Cir. 1992) (invalidating a class action solution for asbestos-grounded claims against Manville because it was "in violation of applicable legal rules"); *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions.").

SUMMARY OF ARGUMENT

The intended meaning and scope of the phrase "related to" in § 1334(b) is anything but clear. In hundreds of opinions, bankruptcy and appellate courts have struggled to interpret § 1334(b)'s phrase, "proceedings . . . related to cases under title 11." The *Amici* believe that, in doing so, some bankruptcy courts[3] have extended § 1334(b) beyond both its intended meaning and permissive constitutional scope to accomplish the overriding beneficial purposes of chapter 11. In that vein, the Bankruptcy Court below exceeded its jurisdiction in pursuit of its pervasive quest to provide for those injured by Manville. It did so by failing to distinguish between derivative claims based on Manville's conduct, of which it had jurisdiction to authorize a non-debtor release, and independent claims against Travelers[4] based on its non-derivative liability for its own alleged wrongdoing, which were not recoverable from Manville, the bankruptcy estate, or its insurance policies. In the *Amici's* view, § 1334(b)'s grant of jurisdiction should not be construed as authorizing a non-debtor release of an independent claim in the absence of clear and unmistakable language evidencing Congress's intent to confer extraordinary jurisdiction that crosses constitutional limits, or at least raises serious constitutional concerns.

The *Amici* also urge that Travelers' provision of funds to Manville in settlement of their dispute over

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[3] Under 28 U.S.C. § 157(a), the bankruptcy courts exercise the jurisdiction conferred on the district courts by 28 U.S.C. § 1334(b).

[4] "Travelers" refers to one or more of the entities whose names includes "Travelers," as listed in *In re Johns-Manville Corp.*, 517 F.3d at 55 n.3.

the policies Travelers sold to Manville cannot serve as a basis for jurisdiction to extinguish these independent claims. Under Manville's plan of reorganization and trust, as under § 524(g) of the Bankruptcy Code enacted to codify the structure of that trust, the only claims "channeled" to the trust were those against Manville, not those against its insurers based on their independent liability for their own alleged tortious conduct. Because the insurance settlement and Manville's reorganization dealt solely with Manville's liabilities, these independent claims against Travelers, for which Manville had no liability, had no connection to Manville's chapter 11 case. Congress could not have intended "related to" jurisdiction to exist between two unconnected matters with no potential to affect a bankruptcy estate even though they may have a common background.

Congress's intent not to confer jurisdiction under § 1334(b) to permanently enjoin and release insurers from their own independent liabilities is evident from its exclusion from § 524(g) of permanent injunctions barring claims to enforce independent liabilities. In asbestos-dominated chapter 11 cases, § 524(g) provides for permanent injunctions to bar the prosecution of claims against an insurer only if their gravamen is a derivative liability of the insurer predicated on a liability of the debtor. *See* § 524(g)(2)(B)(i)(I) (the injunction must implement a trust which only assumes "the liabilities of a debtor"); § 524(g)(4)(A)(ii)(III) (the injunction may only protect an insurer from "claims against, or demands on the debtor."). The theory is that because independent claims have no bearing on the chapter 11 debtor, its estate, or its insurance, they should not be "channeled" to such trust. Because such independent claims against a non-debtor insurer are not

connected to the debtor's bankruptcy, the trust, or its insurance, they have no effect on the debtor. Jurisdiction thus does not extend to extinguish them under the Court's § 1334(b) test for relatedness. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995) (holding that no jurisdiction exists if there is "no effect on the debtor").

These provisions, if construed as urged by Petitioners, aggregate all such independent claims against Travelers into a single class in the chapter 11 case in order to extinguish them without the need to address their merits or to pay anything to the claimants for them. None of the claimants were given a right to withdraw from this non-consensual mandatory class in order to pursue individually their independent causes of action against Travelers. Because of the similarity between this single class aggregating these independent claims against Travelers and class actions governed by Federal Rule of Civil Procedure 23, the basic protections afforded to the claimants in Rule 23 class actions illuminate that § 1334(b) was not intended to confer bankruptcy jurisdiction to extinguish these aggregated independent claims without such protections. As explained by the Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), Anglo-American jurisprudence requires that a person have a day in court on his or her claim as a party to an action, or, if not a party, that such person's interests be "adequately represented by someone with the same interests who is a party." Section 1334(b) could not have been intended to confer bankruptcy jurisdiction to extinguish these independent claims without a day in court and the other protections required in class actions.

Congress also wrote its jurisdictional provisions in § 1334(b) against the backdrop of the importance of property rights in our society and in the law. Property rights have been elevated to the highest level of legal recognition by the protection they are afforded by the Fifth and Fourteenth Amendments. Congress has implemented these constitutional fundamentals in its bankruptcy legislation. In important provisions of the Bankruptcy Code designed to aid in accomplishing reorganization in chapter 11 cases for the benefit of the entire creditor body, Congress placed explicit limitations in order to protect the property interests of non-debtors. For example, "adequate protection" of property interests is required by § 362(d)(1) where the automatic bankruptcy stay, although essential to reorganize, injures property; and § 363(e) likewise requires such protection where a debtor's property is being sold in chapter 11 to further the reorganization. Because Congress could not have intended a sharp departure from the premise of its bankruptcy legislation to protect property interests, § 1334(b) should not be construed to confer jurisdiction to destroy these independent claims.

The *Amici* also urge that the Bankruptcy Court's authorization of these provisions violated the Fifth and Seventh Amendments. These independent claims constitute protected property interests entitled to the Fifth Amendment's due process protections of reasonably detailed notice, an opportunity to be heard, adequate representation, and a determination on their merits, rather than extinguishment by injunction and release. These provisions also took Respondents' independent claims without compensation, in violation of the Fifth Amendment's "takings" provision. Manville's confirmed plan did

not provide for a distribution on these independent claims against Travelers because Travelers' liability, not being derivative of Manville's liability, was not "channeled" to, or paid from, the Manville trust. The independent claims were thus extinguished without just compensation. Further, such extinguishment of Respondents' independent tort claims, as claims at law, deprived them of their Seventh Amendment right to trial by jury.

At the least, serious constitutional concerns are presented by the Bankruptcy Court's extinguishment of Respondents' property interests by the 1986 Confirmation Order or the 2004 "Clarifying Order." Such concerns bear heavily on the interpretation of § 1334(b) and call for it to be construed so as not to lay a jurisdictional foundation for such extinguishment. If, however, the Court interprets § 1334(b) to confer such jurisdiction, the *Amici* urge the Court to hold that such provisions violate the Constitution.

Finally, the 1986 injunction did not make clear that it supposedly barred these independent claims against Travelers. Respondents thus properly objected to the permanent injunction when it was granted for the first time by the 2004 "Clarifying Order," and the Circuit Court correctly reversed it.

POINT I

THE 1986 INJUNCTION FAILED TO CONTAIN REQUIRED DETAIL OF WHAT IT PROHIBITED. THE 2004 "CLARIFYING ORDER" CONTAINED THE FIRST INJUNCTION AND NON-DEBTOR RELEASE OF THE INDEPENDENT CLAIMS AGAINST TRAVELERS, AND PRESENTED THE FIRST OPPORTUNITY TO APPEAL FROM AN ORDER CONTAINING SUCH PROVISIONS.

A basic principle applied in federal court is "that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 444 (1974) (citing Federal Rule of Civil Procedure 65).[5] This principle is founded not only on a desire to provide basic fairness to those against whom an injunction is sought, but also to ensure that an appellate court "know[s] precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974). It has also been recognized that:

> An injunction that does not comply with . . . [Rule 65] may not place the person "enjoined" under any legal obligation, in which event he would lack the tangible stake in seeking to vacate it that Article III of the Constitution requires in any proceeding sought to be main-

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[5] Fed. R.Civ.P. 65(d)(1), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7065 requires that every order granting an injunction "shall state its terms specifically; and describe in reasonable detail—and not by reference to the complaint or other document—the act or acts restrained or required."

> tained in any federal court, including a court of appeals. An injunction that has no binding force at all simply cannot be appealed.

Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 275-76 (7th Cir. 1992).

The injunction included in the 1986 Confirmation Order did not provide fair and specific notice of what the injunction actually prohibited, and it certainly omitted reasonable detail to make clear that it was written to bar the prosecution of these independent tort claims against Travelers. But, that omission is not a surprise. Before the 1986 injunction was issued, Travelers acknowledged that "the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers."[6] (Underlining in original). In fact, the injunction's language in the 1986 order was so vague and ambiguous that 18 years later in 2004, Travelers thought it essential to ask the Bankruptcy Court to issue a precisely drawn injunction, called a "Clarifying Order," to restrain these independent claims against it. That was the first time Respondents could object to such provisions, and was Respondents' first opportunity to appeal an injunction barring their independent claims. It is from this 2004 order that Respondents appealed. Respondents have thus appealed at the earliest possible time the Bankruptcy Court's order purporting to enjoin their independent claims against Travelers. The Circuit Court below properly addressed and voided the injunction.

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[6] Letter Agreement dated June 3, 1985 signed by Travelers, paragraph 7, Respondent's Joint Appendix 11a, 13a-14a.

POINT II

CONGRESS COULD NOT HAVE INTENDED § 1334(b) "RELATED TO" JURISDICTION TO AUTHORIZE EXTINGUISHMENT OF INDEPENDENT CLAIMS AGAINST AN INSURER BY A PERMANENT INJUNCTION AND NON-DEBTOR RELEASE IN A CHAPTER 11 PLAN AND CONFIRMATION ORDER.

A. Congress Intended "Related To" Jurisdiction To Extend Only To Claims That Have An Effect On The Debtor Or Are Derivative Of The Debtor's Liability.

The meaning of § 1334(b) "related to" jurisdiction in bankruptcy cases is anything but clear, having been addressed by hundreds of decisions of bankruptcy and appellate courts before and after the Court's decision in *Celotex*, 514 U.S. 300. There, the Court reviewed the development of this issue across the circuits and concluded that § 1334(b) "related to" jurisdiction does not exist where there is "no effect on the debtor." *Id.* at 308 n.6. The question thus becomes whether the permanent injunction and non-debtor release of the independent claims against Travelers have an "effect on the debtor." Simply put, they do not because these claims could not be recovered from Manville's estate or its insurance policies, and their outcome one way or the other could not affect Manville, its assets or its insurance. The provisions at issue fall outside *Celotex's* test, and, as held by the Court decades ago in *Callaway v. Benton*, 336 U.S. 132 (1949), a bankruptcy court cannot permanently enjoin the prosecution of

a state law cause of action if its outcome could not affect the debtor or its estate.

Congress could not have intended relatedness to be established simply by the need to obtain funds for a reorganization, either through a settlement with an insurer or otherwise. Section 1334(b) was not intended as a "blank jurisdictional check" for a bankruptcy court to authorize anything that an insurer may demand in negotiations with the debtor for the settlement of disputed policy obligations. Otherwise, "related to" jurisdiction would be limitless, as extending to anything an insurer demands to be written into a chapter 11 plan or confirmation order.

The Circuit Court below clearly understood the distinction between derivative and independent causes of action in its decision, 517 F.3d at 63, just as it did 20 years earlier in *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir.), *cert denied*, 488 U.S. 868 (1988). *MacArthur* upheld an injunction against the prosecution of actions against insurers because the claims asserted were "completely derivative of Manville's rights as primary insured," and thus "are no different in this respect from those of the asbestos victims" because they both seek "to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct." *Id.* at 91, 92-93. The insurers' liability under consideration in *MacArthur* was fundamentally different from their non-derivative tort liability at issue here, as carefully noted below. By the terms of Manville's confirmed plan, just as under § 524(g) of the Bankruptcy Code, the only claims that could be "channeled" into, and paid from, the trust were those against Manville or those derivative

of Manville's own liability. These independent claims were thus not "related to" Manville's bankruptcy.

In addition to their independent claims alleging tort liabilities against Travelers, Respondents could have asserted claims against Travelers that *were* derivative of Manville's liability. Such derivative claims against Travelers would in essence have been claims against Manville based on its own wrongs. Manville had liability on those derivative claims and therefore, Travelers had liability thereon by reason of its issuance of insurance policies to Manville. Travelers' liability on such derivative claims was "channeled" to and recoverable from the trust.

Such claims against Travelers asserting derivative liability, as well as those asserted directly against Manville, were properly discharged and enjoined by the Bankruptcy Court's 1986 orders because Manville was a debtor in bankruptcy with limited funds that could not satisfy its liabilities, entitling it to a bankruptcy discharge of the unsatisfied portion. By sharp contrast, Travelers could not be discharged from its independent liabilities, not only because it did not submit all of its assets to its creditors in a bankruptcy filing, which yields a discharge, but also because its funds were sufficient to pay these independent claims in full. Each claimant was thus entitled to an adjudication of the merits of his or her independent claim against Travelers, absent his or her acceptance of a settlement offer.

The fact that these independent claims against Travelers arose from asbestos injuries is wholly irrelevant. "[C]ommon issues of fact" did not connect these independent claims to Manville's chapter 11 case. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Congress would not have intended a

common background of two unconnected matters to form a basis for "related to" jurisdiction.

Nor can § 1334(b) have been intended to authorize non-debtor releases of independent causes of action on the basis that public good is achieved by confirming a chapter 11 plan providing distributions to thousands of injured persons. Indeed, the recovery by those injured by Manville would be enhanced if the independent claims against Travelers are not extinguished. In this regard, while sitting as a judge of the Third Circuit Court of Appeals, Justice Alito rejected the interpretation of a bankruptcy statute urged by a chapter 11 debtor even though, as found by the lower court, it "would jeopardize any hope that the Debtor has of presenting a business plan demonstrating that the Debtor has any chance at reorganization." *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 140, 142 (3d Cir. 1994).

Jurisdiction was not intended by Congress where the only predicate is to achieve an important goal for the public good, however important or worthy it may be. Even the commands of the Fifth Amendment must be enforced, "however great the Nation's need" may be to relax its requirements. *United States v. Security Industrial Bank*, 459 U.S. 70, 77 (1982). As also stated in *Joint Eastern* in decertifying a class of Manville victims: "[W]e cannot uphold as 'sensible' or 'useful' or 'fair' or even 'achieving the most good for the most people' an impairment of rights accomplished in violation of applicable legal rules." *Joint Eastern*, 982 F.2d at 750. Moreover, the provisions at issue may not have been crucial to Manville's reorganization. Travelers could have changed its mind, as parties in interest in bankruptcy cases often do, or a settlement could

have been pursued by Manville with its insurers on other terms. *See In re Bermec Corp.*, 445 F.2d 367, 369 (2d Cir. 1971) ("Creditors have been known to change their minds when a plan is actually put on the table.").

Congress could not have intended § 1334(b) to confer jurisdiction to extinguish these independent causes of action for the further reason that it would run afoul of the cardinal principle, of which Congress was surely aware, that parties cannot voluntarily confer subject matter jurisdiction on a federal court. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). Like other federal courts, the subject matter jurisdiction of the bankruptcy courts is grounded in, and limited by, statute. *See Celotex*, 514 U.S. at 307 (referring to 28 U.S.C. § 1334(b)); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This principle underpins the uniform holdings of the circuit courts that parties cannot write jurisdiction into a plan of reorganization. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004) ("Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization."); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994); *Harstad v. First Am. Bank*, 39 F.3d 898, 902 n.7 (8th Cir. 1994).

It is surprising that the Petitioners rely on the oft-cited decision, *In re Dow Corning*, 280 F.3d 648 (6th Cir. 2002), because that decision strongly supports Respondents. *Dow Corning* enumerates seven factors that must be satisfied for a permanent injunction and non-debtor release to be within a bankruptcy court's "related to" jurisdiction. Two of

Dow Corning's mandatory factors obliterate the Petitioners' position. Specifically, *Dow Corning* states that a non-debtor release and permanent injunction barring the assertion by non-consenting parties of their claims against a non-debtor may be permitted only if numerous requirements, including the following two, are satisfied:

> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; [and]
>
> (6) The plan provides an opportunity for those claimants who choose not to settle *to recover in full*; . . . .

Dow Corning, 280 F.3d at 658 (emphasis added). What *Dow Corning* would require to support a permanent injunction of these independent tort claims against Travelers is an offer of a monetary settlement to all who have such claims and a right for each rejecting claimant to withdraw from the class so as to be free individually to pursue his or her independent claim against Travelers.

The provisions at issue flunk *Dow Corning's* test for bankruptcy jurisdiction if the 1986 injunction were interpreted as urged by Petitioners. If so construed, the injunction barring suit against Travelers on these independent claims precludes any opportunity whatsoever for any recovery thereon because Manville is not liable for Travelers' alleged torts, and Travelers will itself have been discharged from liability thereon. Section 1334(b) should not be interpreted as conferring jurisdiction to do so.

B. Class Action Principles Illuminate That Congress Did Not Intend To Confer Bankruptcy Jurisdiction To Extinguish Independent Claims As An Aggregated Class, Without Affording Each Claimant An Option To Withdraw From The Class In Order To Pursue His or Her Claim Individually.

Congress could not have intended to confer jurisdiction on a bankruptcy court to lump claims into a class for their omnibus extinguishment by a permanent injunction and non-debtor release in a chapter 11 plan and confirmation order, because well-established class action principles would clearly be violated by such extinguishment of Respondents' claims,

- without any vote by the class members on a provision in the chapter 11 plan for such a permanent injunction;
- without any representation in the chapter 11 case of their interests by a party having the same interest as all of the class members;
- without a right for class members to file claims in the chapter 11 case based on the extinguishment of their independent claims;
- without an adjudication in the chapter 11 case of the merits of the class members' independent claims against the non-debtor;
- without offering any settlement in the chapter 11 case to the class members to mitigate the loss of their independent claims; and
- without affording each class member the option to reject a proferred settlement as part of

> the reorganization and to withdraw from the class so as to be able to pursue his or her independent claim individually.

If § 1334(b) were interpreted as the Petitioners contend, the claimants will never have any basis for any recovery on their independent tort causes of action. These injunctive and non-debtor releases were written into Manville's reorganization plan with a blind eye to the fundamental protections required for a class of claimants whose claims are released and discharged by process of the law, without their adjudication on the merits or just compensation for their extinguishment. Absent a clear statement of Congressional intent to confer jurisdiction on the bankruptcy courts to do so, § 1334(b) should not be so construed.

The Court carefully explained the use and limitations of class actions in *Ortiz*, 527 U.S. 815. In that asbestos-injury class action initiated in 1993 for approval of a settlement proposed with the filing of the complaint initiating the action, certification under Federal Rule of Civil Procedure 23 of a "mandatory" class was denied. The Court explained that, if there is a "limited fund" available for distribution, such a "mandatory" class action is permissible under Rule 23(b)(1), in which members of the class do not have a right to exclude themselves from the class in order to pursue their own claims individually, whereas where a fund is available to satisfy the class members' claims in full, Rule 23(b)(3) requires that each have the right to "opt out" of the class. *Ortiz*, 527 U.S. at 834 n.13. There is a "limited fund" only if the action involves a claim "against a fund insufficient to satisfy all claims." *Ortiz*, 527 U.S. at 833-34.

These class action principles illuminate Congress's intention underpinning § 1334(b). Congress could not have intended in an available-funds context, such as where the debtor's insurer is financially strong, to confer bankruptcy jurisdiction under § 1334(b) to grant a non-debtor release and injunction barring independent tort claims without an option for each claimant to "opt out." To do so would run counter to the fundamental principle requiring that each claimant be given the chance to exclude himself or herself from the class whose claims were being released, as is required by Rule 23(b)(3) in an available-funds class action. *Ortiz*, 527 U.S. at 834 n.13. In the present case, because Travelers was financially sound, the fund available to satisfy the claimants' independent causes of action against it was not "limited." Section 1334(b) should not be construed to confer bankruptcy jurisdiction to extinguish independent claims against a non-debtor which can be satisfied from an *unlimited* fund.

Moreover, the Court made clear in *Ortiz* that, for several reasons, "serious constitutional concerns" would be raised by a rule that would permit a mandatory class action that does not afford each class member a right to "opt out." *Id.* at 845. First, it would violate "our deep-rooted historic tradition that everyone should have his [or her] own day in court." *Id.* at 846. Second, it "compromises [the class members'] Seventh Amendment rights without their consent." *Id.* at 846. Third, these principles may be relaxed "when, in certain limited circumstances, a person, although not a party, has his [or her] interest adequately represented by someone with the same interests who is a party . . . ." *Id.* at 846 (citation omitted). Each of these fundamental considerations was disregarded when these perma-

nent injunction and non-debtor release provisions were granted by the Bankruptcy Court. When it crafted § 1334(b)'s "related to" jurisdictional grant, Congress did not intend to confer jurisdiction on a bankruptcy court that would drastically depart from these cardinal principles.

C. Congress's Protection Of Property Interests In The Bankruptcy Code Animates Its Intention Not To Confer Jurisdiction To Release And Discharge Non-Debtors From Liability On Independent Claims By Means Of Injunctions And Non-Debtor Releases In Chapter 11 Plans And Confirmation Orders.

Property occupies an exalted position in our society and in the law. Property interests are protected by the Fifth and Fourteenth Amendments to the Constitution, and causes of action owned by a bankruptcy debtor constitute property protected by those Amendments. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Malinski v. New York*, 324 U.S. 401, 415 (1945) (noting that the Due Process Clause has the same meaning in the Fifth and Fourteenth Amendments). Moreover, Congress has implemented protection for property rights in provisions it has written into the Bankruptcy Code. Congress would not have intended to depart from the fundamental approach involving the protection of property interests when it conferred "related to" bankruptcy jurisdiction in § 1334(b). Congressional intent may be discerned from a number of important provisions in the Bankruptcy Code designed to make chapter 11 a workable structure to deal with and resolve the debtor's financial problems. Significantly, in each such instance, Congress made provision to protect

the property interests of the parties affected by its bankruptcy goal-oriented provisions.

One such provision of the Bankruptcy Code is the "automatic stay" imposed by § 362, which arises by virtue of the filing of a petition commencing a bankruptcy case. That provision is essential for a chapter 11 debtor to have a breathing spell from creditors' claims while it goes about reorganizing. But despite the overriding importance of the automatic stay provision to a debtor's ability to reorganize, Congress specifically provided for the protection of property that is declining in value while its owner is subject to the stay, by mandating in § 362(d)(1) that the owner receive "adequate protection" of the property interest during the continuance of the stay. Further, sales of a chapter 11 debtor's property are often essential for the debtor to reorganize, and Congress thus authorized major property sales under § 363 with court authorization based on a finding of "adequate protection" of a non-debtor party's interest in the property sold, as mandated by § 363(e). Likewise, although post-petition financing is critical for chapter 11 debtors, Congress, by § 364(d), once again required that "adequate protection" be provided for a property interest affected by the credit it authorizes the debtor in possession to receive.

These provisions are illustrative of many included by Congress in the Bankruptcy Code that reflect its policy determination to protect property interests in bankruptcy cases. When enacting provisions for its overriding requirement of "adequate protection," Congress stated that "the concept of adequate protection, is based as much on policy grounds as on constitutional grounds." H.R. 95-595, 95th Cong. 1st

Sess. 339 (1977). In light of Congress's policy determination to protect property interests in its bankruptcy legislation, it is not reasonable to construe § 1334(b) as intending to confer jurisdiction on the bankruptcy courts to extinguish independent causes of action against non-debtors without any protections or compensation whatsoever, at least absent a clear statement by Congress of its intention to do so.

D. Provisions Of Bankruptcy Code § 524(g) Demonstrate That Congress Did Not Intend To Confer Jurisdiction In Asbestos-Dominated Chapter 11 Cases To Permanently Enjoin Prosecution Of Independent Tort Causes Of Action Against Insurers.

What Congress intended by § 1334(b) is answered by its clear and explicit provisions in § 524(g), which do not authorize the issuance of a permanent injunction to protect an insurer from independent claims against it that are not recoverable from the chapter 11 debtor, its trust, or its insurance policies. Congress clearly delineated in § 524(g) of the Bankruptcy Code the limited instances in which a permanent injunction may be issued by a bankruptcy court to bar the prosecution of causes of action against insurers in asbestos-dominated chapter 11 cases, and it could not have intended to confer subject matter jurisdiction to issue such injunctions beyond § 524(g)'s limit. Specifically, subsections 524(g)(1)(A) and (B), 524(g)(2)(B)(i)(I) and 524(g)(4)(A)(ii)(III) provide for enjoining independent claims against an insurer in chapter 11 cases only if the insurer's liability is *derivative* of the debtor's liability. Section 524(g) does not authorize enjoining an independent cause of action predicated on the insurer's own tor-

tious conduct. The reason for this is clear—the purpose of that statute, like the Manville trust, was to resolve the asbestos-related liabilities of the chapter 11 *debtor*. It was not designed or written to free an insurer from its independent liabilities. The chapter 11 debtor has no liability for the independent tortious action of its insurers, and the statute thus does not provide for channeling an insurer's independent liabilities to the trust. Section 524(g) does not allow an insurer to shed its independent tort liabilities by means of an injunction and non-debtor release in a chapter 11 plan or confirmation order.

Section 524(g) provides the governing measurement of Congress's intent, which establishes the scope of the "related to" jurisdiction it conferred, and demonstrates that Congress did not intend to confer jurisdiction to permanently enjoin independent tort causes of action against insurers predicated on their own alleged wrongdoing. Although its text is complex, § 524(g) makes clear that an injunction against prosecuting claims may only enjoin those claims which are based on the liability of the chapter 11 debtor arising from claimants' exposure to asbestos and "channeled" into a trust created pursuant to that statute. Thus, subsection 524(g)(1)(B) provides for an injunction if the enjoined claim is to be paid from a trust described in paragraph (2)(B)(i)(I), which, in turn, describes such a trust as one that "assume[s] the liabilities *of a debtor*" arising from exposure to asbestos. (emphasis added). Any doubt about the unavailability of an injunction to bar the prosecution of independent tort claims against an insurer is dispelled by § 524(g)(4)(A)(ii)(III), which plainly states that an injunction can be issued to protect an insurer only if the insurer is or may become liable "for the conduct of . . . *the debtor*."

(emphasis added). Congress could not have intended § 1334(b) to confer jurisdiction on the bankruptcy courts to permanently enjoin independent tort claims against an insurer that are outside the claims structure of § 524(g).

This does not mean that such independent claims against insurers can never be enjoined by a confirmation order in an asbestos-dominated chapter 11 case. They can, but only if each claimant whose claim is to be extinguished in the bankruptcy by such an injunction or non-debtor release is given the right to "opt out" of the class in which such independent claims are placed by the chapter 11 plan, so as to be free to pursue his or her independent claim individually against the insurer. As an alternative to providing such "opt out" provisions in a chapter 11 plan, an "opt out" settlement class action to resolve the independent claims against an insurer could be filed as an adversary proceeding in the chapter 11 case as authorized by Bankruptcy Rule 7023, or commenced in a non-bankruptcy court, each with the protections afforded by Rule 23.

While the Bankruptcy Court in this case stressed the importance of the "global finality" of its permanent injunction, the plain language of § 524(g) stands in the way of interpreting § 1334(b) to confer jurisdiction to issue an injunction barring actions based on independent claims against insurers and to release them from liability thereon. In this regard, Justice Alito, in interpreting bankruptcy legislation in *Price Waterhouse*, 19 F.3d at 142, an appeal before him while a judge of the Third Circuit Court of Appeals, rejected resort to pragmatic concerns of a bankruptcy court to facilitate reorganization and applied the plain language used by Congress in

Bankruptcy Code § 327(a). The same approach to § 524(g) is required, given its plain text. It is evident that Congress did not intend by § 1334(b), as illuminated by the clear and unambiguous provisions of § 524(g), to confer the jurisdiction on the bankruptcy courts urged by Petitioners to accomplish their view of a worthy goal.

POINT III

EVEN IF THE COURT INTERPRETS § 1334(b) AS CONFERRING JURISDICTION TO PERMANENTLY ENJOIN AND RELEASE RESPONDENTS' INDEPENDENT CLAIMS AGAINST TRAVELERS, SUCH PROVISIONS VIOLATE THEIR CONSTITUTIONAL RIGHTS.

By applying the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided," *Security Industrial Bank*, 459 U.S. at 78 (referring to a section of the Bankruptcy Code), this appeal may be resolved by a determination that § 1334(b) does not confer jurisdiction to issue the permanent injunction and non-debtor release at issue. Doing so would make it unnecessary to consider the Fifth and Seventh Amendment issues raised by the injunction and release. If, however, the Court determines that § 1334(b) does confer such jurisdiction, the *Amicis'* analysis will establish that enjoining Respondents' claims violates their Constitutional rights under the Fifth and Seventh Amendments.

A. Granting An Injunction Against Respondents' Independent Claims Without Notice That They Would Be Extinguished, Or A Hearing, Would Violate Their Fifth Amendment Right To Due Process.

The Fifth Amendment provides that government shall deprive no person of life, liberty, or property, without due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Malowski v. New York*, 324 U.S. at 415 (noting that the Due Process Clause has the same meaning in the Fifth and Fourteenth amendments); *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (involving the Fifth Amendment's Due Process Clause). In the present case, Respondents' right to due process of law was violated by the Bankruptcy Court's permanent injunction, because: (1) Respondents' independent causes of action constituted property entitled to due process protection; (2) Respondents were not provided notice that a proceeding was instituted to deprive them of their independent tort claims against non-debtors which could not ultimately be recovered from Manville, its estate, the trust or its insurance; and (3) Respondents were not given an opportunity to be heard before their property interests in their tort causes of action were destroyed.

i. Respondents' independent tort causes of action are property under the due process clause.

The Court long ago established that a cause of action is property entitled to due process protection under the Constitution, and has made clear that the Due Process Clauses mean the same thing in the Fifth and Fourteenth Amendments. *See, Malinski*, 324 U.S. at 415 (noting that due process of law means the same thing in the Fifth and Fourteenth Amendments). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court also made clear that a state law created cause of action is property under the Due Process Clause. *Logan*, 455 U.S. at 428-33. In that case, the Court asserted: "[W]e must determine whether Logan was deprived of a protected interest . . . . The first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. *See also Rogers*, 357 U.S. at 209 (involving the Fifth Amendment's Due Process Clause). Therefore, Respondents' state law created causes of action constitute property entitled to protection under the Fifth Amendment's Due Process Clause.

ii. Respondents were not given notice calculated to warn them that their independent tort causes of action were to be extinguished by confirmation of the chapter 11 plan.

In *Mullane*, the Court articulated the constitutional requirement for notice, stating:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [citations omitted]. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance [citations omitted]. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee. . . . [citations omitted].

Mullane, 339 U.S. at 314-15. Respondents were therefore entitled to notice reasonably calculated to apprise them of any proceedings seeking such permanent injunction. The insertion in the Confirmation Order of a muffled provision extinguishing their independent claims was constitutionally inadequate.

In this case, the insufficiency of notice was patent. Although "notice required will vary with circumstances and conditions," *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 115 (1956), in certain situations, such as class actions, a precise notice scheme has been established. *See* Rule 23(c)(2)(B) (requiring "individual notice to all members who can be identified through reasonable effort"); Rule 23(c)(2)(B)(i)-(vii) (enumerating seven items requiring that notice be written in plain, easily understood language).

The notice requirements in class actions provide an appropriate standard against which to measure

what notice was required in the present case, because the need for notice is strikingly similar in both situations. Specifically, in this case the rights at issue are those of individuals who were not represented with respect to their independent claims against the insurers. The injunction at issue violated a fundamental "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). An exception to this fundamental principle is made for class actions, where specific protections are given. In such cases, as in the present one, "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1854).

In the present case, care was not taken to ensure that Respondents' interests were protected. Specifically, no notice was provided to Respondents in 1986 that their claims against non-debtors were to be extinguished, even though they could have been identified through reasonable efforts. *See* Rule 23(c)(2)(B). Furthermore, Respondents were not provided with notice stating in plain language, or otherwise: "the nature of the action," Rule 23(c)(2)(B)(i), the "claims, issues, or defenses," Rule 23(c)(2)(B)(iii), or the "effect of" an injunction, Rule 23(c)(2)(B)(vii).

iii. Respondents were not provided an opportunity to be heard.

Due Process requires "'an opportunity . . . granted at a meaningful time and in a meaningful manner,' for [a] hearing appropriate to the nature of the case." *Boddie v. Conn.*, 401 U.S. 371, 378 (1971) (citations omitted). Even when providing a hearing would impose a substantial financial burden on the tribunal, a hearing must be provided. *Id.* at 381. In the present case, Respondents were not afforded any hearing before their constitutionally protected property interests were extinguished.

B. Granting The Permanent Injunction At Issue Violated The "Takings" Clause Of The Fifth Amendment.

The issuance of the injunction by the Bankruptcy Court against Respondents' independent state law causes of action violates the Fifth Amendment prohibition of governmental taking of private property for public use without just compensation. This is because: the "takings" clause, as construed by the Court, (1) prohibits a taking except "for public use," and (2) prohibits a taking without "just compensation" even if "for public use."

i. Respondents' independent causes of action in tort against Travelers constitute property for purposes of the "takings" clause of the Fifth Amendment.

Although the Court has not ruled on whether a tort cause of action is a property interest entitled to protection under the "takings" clause of the Fifth Amendment, such a holding is supported by the Court's willingness to find a protected property

interest in intangible interests and by historical precedent of lower federal courts. Moreover, Justice Powell had stated in a concurring opinion that tort causes of action are entitled to protection from government taking without just compensation. *See Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons.").

The Court has long held that the term "property" in the "takings" clause was not "used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945). Instead, the Court has been "mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). With this axiom in mind, the Court has found numerous forms of intangible interests to be property protected by the "takings" clause. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmens' liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (real estate liens); *Lynch v. United States*, 292 U.S. 571 (1934) (valid contracts).

Furthermore, lower federal courts have provided takings protection to causes of action in tort since

at least 1886. *See, e.g., Gray v. United States*, 21 Ct. Cl. 340, 393 (1886) (stating that "[the tort causes of action] were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment"); *see also In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (stating that "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation").

In the present case, Respondents' independent causes of action against Petitioner fit within the Court's rubric of protected property for "takings" clause purposes and are analogous to decisions of lower federal courts. In *Monsanto*, the trade secrets were given "takings" protection because they shared "many of the characteristics of more tangible forms of property." *Monsanto*, 467 U.S. at 1002. Here, the Respondents' state law tort causes of action also share many characteristics of more tangible forms of property in that they are assignable, can be the *res* of a trust, and pass to a trustee in bankruptcy. Respondents' independent causes of action also fit squarely within the lower courts' holdings. *See also Celotex*, 514 U.S. at 308 n.5 (stating that "causes of action owned by the debtor . . . become property of the estate pursuant to 11 U.S.C. § 541. . . .").

ii. The "takings" clause prohibits a taking except "for public use," and also prohibits a taking without "just compensation" even if "for public use."

Independent causes of action against non-debtors are fundamentally different from those against a debtor in bankruptcy. Claims against a debtor in bankruptcy are constitutionally discharged to the extent not satisfied by distributions in the bankruptcy case because the debtor "is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189-90 (1902). By sharp contrast, claims against one who does not file for bankruptcy cannot be discharged without providing "just compensation," as mandated by the "takings" clause of the Fifth Amendment. Here, the independent tort causes of action at issue were against an entity that did not surrender all its assets for the benefit of its creditors. Although these claimants' claims against Manville were discharged under § 1141(d)(1)(A) of the Bankruptcy Code to the extent they were unpaid by distributions from the trust, the claimants had a constitutional right to full payment on their claims against Travelers, which was not entitled to a discharge outside of bankruptcy. Nevertheless, Travelers was discharged from liability without surrendering its assets, thereby leaving the claimants without any ability to recover compensation for their independent claims against Travelers, in violation of their rights under the "takings" clause.

The "takings" clause has long been interpreted by the Court (1) to prohibit a taking except "for public use," and (2) to prohibit a taking without "just com-

pensation" even if "for public use." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (stating, "A purely private taking could not withstand the scrutiny of the public use requirement."). *See also Kelo v. City of New London*, 545 U.S. 469, 477, 491, 500 (2005) (the majority, concurrence, and dissent agreed with the principle of *Midkiff*). *See also id.* at 507 (Thomas, J. dissenting) (stating, "[T]he Takings Clause also prohibits the government from taking property except 'for public use.' "). In the present case, the "takings" clause was clearly violated under either prohibition of that clause because the taking was both for the private benefit of a limited class of injured persons, and was also without any compensation.

It is also settled law that a taking of property without just compensation is unconstitutional even absent a benefit to the governmental agency that takes the property.

> The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

Gen. Motors Corp., 323 U.S. at 378; *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). As Justice Holmes concluded almost 100 years ago, the takings clause "requires that an owner of property taken should be paid for what is taken from him . . . [a]nd the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of*

Commerce v.City of Boston, 217 U.S. 189, 195 (1910).

The issuance of the permanent injunction and non-debtor release for Travelers reduced the value of Respondents' causes of action to zero. Respondents were not provided with *any* compensation in any form whatsoever on account of their independent causes of action against Travelers. The injunction at issue thus does not pass muster under the Fifth Amendment.

C. Granting An Injunction Against Respondents' Independent Claims Violated Their Seventh Amendment Right To Trial By Jury.

The causes of action at issue were "plain vanilla" state law tort causes of action to recover money damages for Travelers' alleged wrongdoing, including fraud. They present a classic case requiring trial by jury as provided in the Seventh Amendment. This right was violated by the Bankruptcy Court's injunction. "Since Justice Story's time, the Court has understood . . . [the Seventh Amendment] . . .'to refer . . . [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-48 (1998) (citation omitted) (emphasis in original). The Court has established "beyond peradventure that '[i]n cases of fraud or mistake . . . a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received.'" *Granfinanciera, S.A. v.*

Nordberg, 492 U.S. 33, 47-48 (1989) (quoting *Buzard v. Houston*, 119 U.S. 347, 352 (1886)). Because Respondents' claims were ones involving allegations of fraud and other torts for which they sought money judgments, the Seventh Amendment preserved their right to trial by jury.

Moreover, the filing of proofs of claim by the claimants in the Manville chapter 11 case did not effect a waiver of their right to trial by jury of their independent causes of action against Travelers. Under *Langenkamp v. Culp*, 498 U.S. 42, 44-5 (1990), by filing a proof of claim with respect to a claim *at law* otherwise triable by jury, the creditor does waive its Seventh Amendment right to a jury trial, but only with respect to the claim asserted by the filed proof of claim and those necessary to adjudicate the filed claim. The theory for such waiver is that such filing converts the asserted claim at law into an equitable claim as part of the "claims-allowance process" used by bankruptcy courts to determine whether to allow or disallow filed claims.

In this case, there was no waiver of Respondents' independent causes of action against Travelers because they were not part of the "claims-allowance process" that arose from the filing of proofs of claim. As explained in *Germaine v. The Connecticut National Bank*, 988 F.2d 1323, 1327 (2d Cir. 1993), a claim becomes part of the "claims-allowance process" only if its resolution is essential to determine whether to allow or disallow the claim asserted by the filed proof of claim. Here, the resolution of the claimants' independent causes of action against Travelers had no bearing on whether to allow or disallow any proofs of claim they may have filed in the chapter 11 case. These independent claims against

Travelers were not part of the "claims-allowance process," and there was thus no waiver of the Respondents' Seventh Amendment rights.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

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Dated: February 26, 2009

AMICUS CURIAE BRIEF

118 (8)

No. 08-295

IN THE
Supreme Court of the United States

THE TRAVELERS INDEMNITY CO. ET AL.,
Petitioners,
v.
PEARLIE BAILEY ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

Resolute Management Inc. is the administrative arm of the Berkshire Hathaway Insurance Group's run-off operation. The primary business activity of the run-off operation is the assumption of other insurers' liabilities arising from their discontinued lines of business, spanning in some cases decades of historical underwriting activity. The long-tail insurance liabilities assumed under these transactions include liabilities related to asbestos exposure, and the resolution of a material sum of those liabilities has been in the context of bankruptcy proceedings, where an important component of the consideration underlying the insurers' settlements has been the protection afforded by channeling injunctions like the one issued by the bankruptcy court in this case, and similar injunctions issued by bankruptcy courts in subsequent cases under 11 U.S.C. § 524(g). The finality afforded by those settlements, and the reliability of the protection promised to the settling insurers as part of those settlements, are important aspects of Resolute's past and future business activities.

SUMMARY OF ARGUMENT

1. This case does not raise an issue of "subject matter jurisdiction," as the Second Circuit erroneously assumed. The bankruptcy court plainly

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

had subject matter jurisdiction over the "civil proceeding" in which the challenged injunction was issued, because the injunction was an essential component of settlements resolving entitlement to the bankruptcy estate's most valuable asset, and those settlements in turn were essential to confirmation of the plan of reorganization for Johns-Manville Corporation ("Manville"). *See* 28 U.S.C. §§ 157(b)(2)(L) and 1334(b). Whether, in the course of that proceeding, the bankruptcy court could grant injunctive relief covering claims that do not "directly affect the *res* of the bankruptcy estate" (Pet. App. 31a) is a question concerning the proper scope of a bankruptcy court's equitable powers, not one of "subject matter jurisdiction." Granting such relief fell well within the scope of the bankruptcy court's equitable powers under sections 105 and 1123 of the Bankruptcy Code, and the injunction in question is a familiar form of equitable relief granted in connection with approval of global settlements. *See, e.g.*, *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 381-82 (1996).

2. Whether framed as an attack on the bankruptcy court's subject matter jurisdiction or an attack on the scope of the court's equitable powers, Respondents' challenge to the validity of the injunction should not be entertained. The injunction at issue is embodied in the bankruptcy court's judgment confirming Manville's plan of reorganization. That judgment became final more than 20 years ago, and under this Court's longstanding precedent is not open to collateral attack, even on the ground that the bankruptcy court lacked subject matter jurisdiction to issue the injunction. *See, e.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

Permitting a challenge of this sort to proceed, two decades after the time for direct appeal has passed, would render virtually any settlement embodied in a judgment confirming a plan of reorganization vulnerable to being unwound, long after parties both inside and outside the bankruptcy proceedings have taken actions that cannot be reversed in reliance on the presumed validity of the judgment. The rule barring collateral attacks on civil judgments is designed to protect precisely these interests in finality and repose.

ARGUMENT

I. BANKRUPTCY COURTS HAVE THE POWER, WHEN APPROPRIATE, TO ENJOIN CLAIMS THAT DO NOT DIRECTLY AFFECT THE *RES* OF THE BANKRUPTCY ESTATE.

In deciding whether the bankruptcy court had the authority to issue the injunction challenged here, there are two separate, analytically distinct questions to be answered, which the Second Circuit conflated. The first is whether the bankruptcy court had "subject matter jurisdiction" over the proceeding in which the injunction was issued; the second is whether the bankruptcy court's broad equitable powers authorized it to grant the type of injunctive relief involved here.

Analysis of the first question is straightforward. "Only Congress may determine a lower federal court's subject-matter jurisdiction," and "Congress did so with respect to bankruptcy courts in Title 28" – specifically, 28 U.S.C. §§ 157 and 1334. *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Section 1334

grants district courts original and exclusive jurisdiction over "all cases under title 11," and original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). Bankruptcy courts have jurisdiction over the same classes of cases and proceedings pursuant to section 157. 28 U.S.C. § 157(a).

Although the Second Circuit grounded its decision on a supposed lack of "subject matter jurisdiction" (Pet. App. 35a), it never analyzed the text of the controlling statutes. The text of section 1334 makes clear that analysis of subject matter jurisdiction occurs at the level of "civil proceeding," not at the level (as the Second Circuit erroneously assumed) of the particular *remedy* afforded in the course of a proceeding. Thus, the relevant question here is whether the bankruptcy court had subject matter jurisdiction over the civil proceeding in which the challenged injunction was issued; if it did, no further analysis is required to determine whether the court had "subject matter jurisdiction" to grant the specific form of equitable relief awarded.

The bankruptcy court unquestionably had subject matter jurisdiction over the "civil proceeding" in which the challenged injunction was issued. The injunction was an essential component of settlements that resolved a dispute between Manville and its insurers over entitlement to the proceeds of Manville's insurance policies. Pet. App. 8a-9a. The bankruptcy court had subject matter jurisdiction over that dispute because the insurance policies "were the bankruptcy estate's most valuable asset." *Id.* at 8a. The settlements, in turn, were the "cornerstone" of Manville's plan of reorganization (*id.* at 44a), and the

bankruptcy court's injunction was therefore "embodied in the 1986 Confirmation Order." *Id.* at 9a. The confirmation of Manville's reorganization plan was a core proceeding "arising in" or "arising under" a case under Title 11. *See* 28 U.S.C. § 157(b)(2)(L).

Whether, during the course of that proceeding, the bankruptcy court had the power to enjoin the claims at issue is a separate question. But it is assuredly not a question of "subject matter jurisdiction." It is instead a question concerning the scope of a bankruptcy court's equitable powers, and in particular (as relevant here) the powers conferred by sections 105 and 1123 of the Bankruptcy Code. Section 105 authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" (11 U.S.C. § 105(a)), and section 1123 provides authority of a similar nature with respect to the court's approval of a plan. 11 U.S.C. § 1123(b)(6) (a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title").

When construing the scope of a bankruptcy court's equitable powers (and the authority of equity courts generally), this Court has emphasized the breadth and flexibility of that authority. *See, e.g.*, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 675-76 (1935). When exercising their authority under sections 105(a) and 1123(b)(6), bankruptcy courts may, when appropriate, grant

relief deemed "necessary for a reorganization's success" even if such relief is not expressly authorized elsewhere in the Bankruptcy Code. *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 551 (1990). This Court's decisions reflect the view that, so long as they "have not transgressed any limitation on their broad power," bankruptcy courts are free to be innovative in fashioning appropriate forms of equitable relief. *Id.* at 551.

This Court has made clear, of course, that in exercising their "broad power" under section 105(a), bankruptcy courts may not grant relief that is inconsistent with an explicit command in the Bankruptcy Code. *United States v. Noland*, 517 U.S. 535, 540-41 (1996). The Second Circuit did not identify any provision of the Code, however, that purports to restrict a bankruptcy court's authority to issue injunctive relief in favor of non-debtors who contribute substantial funds to the estate as part of a settlement with the debtor, pursuant to confirmation of a consensual plan of reorganization. Nor did the court identify any provision of non-bankruptcy law that could be deemed inconsistent with the granting of such relief.

The only question raised by the Second Circuit's opinion is whether a bankruptcy court may approve a settlement enjoining claims that it would not independently have had subject matter jurisdiction to adjudicate. *See* Pet. App. 18a (asserting, without analysis, that a bankruptcy court lacks authority "to enjoin claims over which it had no jurisdiction"). Petitioners have persuasively shown why the claims at issue here would independently fall within the scope of a bankruptcy court's subject matter jurisdiction. But the Court need not squarely resolve

that issue, because equity courts have long adjudicated claims related to the controversy that brought the case into equity, even though those claims would not independently have been within the court's jurisdiction, when necessary to "do complete rather than truncated justice." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). As this Court stated in *Camp v. Boyd*, 229 U.S. 530 (1913), "a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority." *Id.* at 552; *see also Porter*, 328 U.S. at 398 ("the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances").

Thus, under its inherent powers as a court of equity, the bankruptcy court had ample authority to approve a settlement of a dispute that plainly was within its subject matter jurisdiction – here, the dispute over entitlement to a valuable asset of the estate – even if the ancillary injunctive relief it afforded reached claims that would not independently have been within its jurisdiction. That the granting of such relief in the context of settlement is by no means a novel exercise of equitable authority is confirmed by this Court's decision in *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996). There, the Court held that a state chancery court could validly approve a class settlement that released claims within the exclusive jurisdiction of the federal courts, notwithstanding the state court's lack of subject matter jurisdiction to adjudicate those claims

on the merits. *Id.* at 381-82.[2] As a result, even if the injunction challenged here were regarded as effecting a "release" of the enjoined claims (which is not the case because the injunction instead channeled those claims to the Manville Trust for liquidation), the equitable power exercised by the bankruptcy court would tread no new ground.

At bottom, then, in this case the propriety of granting equitable relief to enjoin claims that do not "directly affect the *res* of the bankruptcy estate" (Pet. App. 31a) ultimately turns on whether such relief was in fact "necessary" and "appropriate," as sections 105(a) and 1123(b)(6) require. But that "presents a question addressed not to the power of the court but to its discretion" (*Continental Ill. Nat'l Bank*, 294 U.S. at 677), and there is no claim here that the bankruptcy court's discretion "was abused or improvidently exercised if power was not lacking." *Steelman v. All Continent Corp.*, 301 U.S. 278, 288 (1937). The bankruptcy court's extensive findings, affirmed by the district court and left undisturbed by the Second Circuit, document both the necessity of the injunction to Manville's successful reorganization and its appropriateness in terms of scope and effect. *See, e.g.*, Pet. App. 170a-171a. The Second Circuit's decision should therefore be reversed.

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[2] The same rule prevails in federal courts. *See Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which *could not have been presented* as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.") (emphasis added).

II. THE VALIDITY OF THE BANKRUPTCY COURT'S JUDGMENT IS NOT SUBJECT TO COLLATERAL ATTACK.

Regardless of how Respondents' challenge is framed – whether as an attack on the bankruptcy court's subject matter jurisdiction or as an attack on the scope of the court's equitable powers – the Second Circuit's decision should be reversed for another reason: The injunction challenged here is embodied in a judgment that became final more than 20 years ago, and the validity of that judgment may not be collaterally attacked in this proceeding.

The "jurisdictional" challenge Respondents have raised does not contest the bankruptcy court's jurisdiction to issue the Clarifying Order in 2004. All agree, including the Second Circuit, that the bankruptcy court "had continuing jurisdiction to interpret and enforce its own 1986 orders." Pet. App. 17a. The bankruptcy court also found, as a factual matter, that the terms of the original injunction cover the claims at issue in this case, because those claims necessarily "arise out of" and are "related to" the Manville insurance policies issued by Petitioners. *Id.* at 173a. The district court affirmed that finding and the Second Circuit left it undisturbed. *Id.* at 18a, 32a. Thus, as this case comes to the Court, the only "jurisdictional" challenge raised is to the bankruptcy court's subject matter jurisdiction in 1986 to issue the injunction in the first place.

That challenge should not be entertained because it represents an impermissible collateral attack on a judgment that has long since become final. The bankruptcy court's injunction was embodied in the order confirming Manville's reorganization plan, which constitutes the relevant judgment in this case.

The validity of the injunction was challenged on appeal by a Manville distributor, which claimed that the bankruptcy court lacked "jurisdiction" to enjoin it from prosecuting its own claim for coverage under the Manville insurance policies. The Second Circuit squarely rejected that challenge (*MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988)), and upon denial of *certiorari* the judgment became final.

This Court has long held that a final judgment in a civil action is not open to collateral attack in subsequent proceedings, even on the ground that the court rendering the judgment lacked subject matter jurisdiction. The Court first announced this rule in *Skillern's Executors v. May's Executors*, 10 U.S. 267, 268 (1810), and has adhered to that rule in an unbroken line of decisions that extends to the present day. *See, e.g.*, *Kontrick*, 540 U.S. at 455 n.9 ("Even subject-matter jurisdiction, however, may not be attacked collaterally.") (citing *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552 (1887)).

The rule barring collateral attacks on final judgments applies with full force to judgments entered in bankruptcy proceedings. In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the Court held that a party who unsuccessfully challenged subject matter jurisdiction in the bankruptcy court could not collaterally attack the validity of the bankruptcy court's judgment in a subsequent state court action. *Id.* at 172. And in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the Court refused to permit a collateral attack on a bankruptcy court's judgment where the parties involved in the original proceeding had an opportunity to challenge the court's jurisdiction, even though no such

challenge was actually litigated there. *Id.* at 375 ("these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it").

Under these cases, the validity of the bankruptcy court's injunction may not be collaterally attacked on the ground that the court lacked subject matter jurisdiction in 1986. The judgment incorporating that injunction has been final now for more than 20 years, and numerous parties – both inside and outside the bankruptcy proceedings – have taken actions over the past two decades in reliance on the presumed validity of that judgment. To afford any measure of stability, rules governing the finality of judgments must provide a clear point beyond which matters deemed settled may no longer be contested, even at the risk that review of perceived errors will be foreclosed. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 172.

The interests in finality and repose protected by the rule barring collateral attacks are especially strong in this case. The injunction entered by the bankruptcy court was an integral part not only of the global settlement concerning Manville's insurance assets, but also of the broader global settlement that Manville's consensual plan of reorganization represents. Pet. App. 8a-9a. The reorganization could not have proceeded absent creation of the Manville Trust, and the Manville Trust could not have been created without the funds Manville's insurers agreed to contribute in exchange for "a full and complete release of liabilities that were in any way related to or based on Manville." *Id.* at 134a. The bankruptcy court expressly noted that, without

such protection, Petitioners would not have settled. *Id.* Yet the effect of the Second Circuit's ruling is to invalidate the consideration Petitioners expected to receive in return for the funds they contributed, even though it is now impossible to return the parties to the *status quo ante*.

The Second Circuit's ruling, if permitted to stand, would cast doubt on the finality of virtually any settlement embodied in a judgment confirming a plan of reorganization. If the judgment in this case is not treated as final, two decades after its affirmance, when literally hundreds of thousands of claimants have been paid billions of dollars from a trust whose very existence depended on the validity and finality of that judgment, it is difficult to imagine a bankruptcy court judgment that would be safe from collateral attack. Allowing such attacks would thwart the legitimate reliance interests of insurers who, like Petitioners, have reached settlements (and paid settlement funds) in past bankruptcy proceedings in the belief that they had negotiated "global finality" (Pet. App. 172a), thereby undermining the incentive of similarly situated parties to settle in future proceedings. It would also thwart the legitimate reliance interests of parties who, like *amicus curiae*, have assumed the liabilities of insurers in the run-off market in exchange for a fixed sum, based on the assumption that the settlements reached by those insurers in bankruptcy proceedings are valid and final.

The Court should adhere to its longstanding rule barring collateral attacks of this sort, and hold that Respondents' challenge to the bankruptcy court's subject matter jurisdiction is foreclosed.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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